

DATE: January 28, 1997

---

In Re:

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

Applicant for Security Clearance

---

DOHA Case No. 96-0607

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR THE GOVERNMENT

Barry M. Sax, Esquire

Department Counsel

FOR THE APPLICANT

*Pro Se*

STATEMENT OF THE CASE

On August 30, 1996, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*," dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6 "*Defense Industrial Personnel Security Clearance Review Program*" (Directive) dated January 2, 1992, as amended by Change 3, dated February 13, 1996, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make a preliminary determination that it was clearly consistent with the national interest to grant or continue a security clearance for her.

A copy of the SOR is attached to this Decision and included herein by reference.

Applicant responded to the SOR in writing on September 19, 1996, and requested a hearing before a DOHA Administrative Judge. The case was assigned to this Administrative Judge on October 7, 1996. On November 7, 1996, a hearing was convened for the purpose of considering whether it would be clearly consistent with the national security to grant, continue, deny, or revoke Applicant's security clearance. The Government's case consisted of three exhibits; Applicant relied on 2 exhibits, three witnesses, and her own testimony. A transcript of the proceedings was received on January 14, 1996.

FINDINGS OF FACT

Applicant has admitted, with explanation, all of the factual allegations pertaining to drug involvement (Criterion H) set forth under subparagraphs 1.a. through 1.f., and all of the factual allegations pertaining to criminal conduct (Criterion J) under subparagraphs 2.a. and 2.b.

After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is a 39 year old employee of a defense contractor. She has worked for her current employer since July 1995 and is applying for a clearance.<sup>(1)</sup>

A favorable preliminary determination could not be made in her case because of her long-time involvement in the use and trafficking of amphetamines (speed).

Applicant's drug use began during the early 1970's while she was in high school. She smoked marijuana as often as daily during high school, but stopped using it after high school--in about 1975--when she married someone who did not use drugs and did not want Applicant to use them. Applicant began using amphetamines around 1980 after she divorced in order to help her lose weight. Initially, she used one or two lines a day; by 1989, she was using 1½ grams daily. Applicant also used cocaine about 10 times between 1987 and 1989.

Shortly after she began using amphetamines, Applicant began selling them in order to support herself since she was not working regularly. By the late 1980's she was selling amphetamines on an almost daily basis (Tr. 47). She continued to use and sell amphetamines until she was arrested.

On October 18, 1989, Applicant and her cohabitant were arrested and charged with violating the Controlled Substance Act of State A after they had sold cocaine (one sale) and methamphetamine (four sales) to undercover police officers on several different occasions. Applicant was indicted on four counts of selling methamphetamine, one count of selling cocaine, and one count of possession of methamphetamine with intent to distribute--all felonies. A jury found Applicant guilty of the charges which alleged that she had sold methamphetamine and cocaine, but not guilty of the charge which alleged possession of methamphetamine with intent to distribute. Applicant was sentenced to 20 years in prison on each of the five counts of possession (sentences to run concurrently). She was also ordered to participate in alcohol and drug evaluation, and to pay a fine of \$5,520.00.

After serving one year in prison, Applicant was paroled on July 5, 1991. One year after being paroled, she was allowed to serve the remainder of her sentence on probation. The conditions of her probation included-- along with other requirements--the requirement that Applicant abstain from all drugs and alcohol, and that she **not** cohabit with the man who had been her accomplice and co-defendant in the criminal charges. Applicant's probation was revoked on March 23, 1995, after she tested positive for amphetamines and was found to be cohabiting with her co-defendant. Applicant was ordered back to prison for 60 days.

Applicant and her former co-defendant/cohabitant were married on February 16, 1996, because it was the only way that she could continue to see him without violating the terms of her probation (Tr.66). Neither she nor her husband currently use illegal drugs. Applicant is currently taking a prescription medication for weight control (Applicant's answer to the SOR).

Applicant loves her job; she enjoys and respects the people with whom she works. Her employer considers her to be a good worker whose performance in every rated element has been consistent with the requirements of her position.

### POLICIES

The Adjudicative Guidelines of 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 with reasonable consistency that are clearly consistent with the interests of national security. In making those 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 the factors set forth in section F.3. of the Directive as well. In that vein, the government not only has the burden of proving any controverted facts alleged in the SOR, it must also demonstrate that the facts proven have a nexus to an applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter.

**DRUG INVOLVEMENT**

(Criterion H)

**Drugs are defined as mood and behavior altering:**

- (a) drugs, materials, and other chemical compounds identified and listed in the Controlled Substance Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens) and
- (b) inhalants and other similar substances.

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

- (1) Any drug abuse
- (2) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

**Conditions that could mitigate security concerns:**

- (3) A demonstrated intent not to abuse any drugs in the future.

**CRIMINAL CONDUCT**

(Criterion J)

**Conditions that could raise a security concern:**

- (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:**

None applicable.

**Burden of Proof**

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to the applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates that it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where 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 that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands that Court's rationale, doubts are to be resolved against an applicant.

**CONCLUSION**

Having considered the record evidence in accordance with the appropriate legal precepts and factors, this Administrative Judge concludes that the Government has established its case with regard to Criteria H and J.

In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section F.3, as well as those referred to in the section dealing with the Adjudicative Process, both in the Directive.

The Government has met its burden with respect to Criterion H. Applicant has admitted that she used amphetamines to the point of addiction during the late 1980's, prior to her arrest on several counts of selling methamphetamine and cocaine. In addition to using amphetamines daily for at least three years, Applicant had also actively trafficked in amphetamines. By her own admission, she was selling amphetamines on an almost daily basis during the late 1980's (Tr. 47). She sold drugs to support her own habit, and to earn a living since she was unemployed during much of the time.

Mitigation for Applicant's involvement with illegal drugs is found in the drug free life style she has lived for most of the past seven years. Except for using amphetamines on two or three occasions in March 1993 incident to the revocation of her probation, Applicant has abstained from all illegal drugs since her arrest in 1989. She has regained custody of her daughter and is now more involved and connected with her extended family than when she was using drugs (Tr. 32, 39, 58-59). She is now taking a prescription drug to help her lose weight as an alternative to the amphetamines on which she had previously come to rely. All of the evidence indicates that Applicant has stopped using illegal drugs even though she has not completed a drug treatment program or remained committed to an aftercare support group such as Narcotics Anonymous (NA). While she is subject to random urinalysis as a condition of her probation, she has not been tested since being released from prison after the revocation of her probation (Tr. 56). The fact that she is subject to random urinalysis makes it much less likely that she will again use drugs--especially in view of her expressed aversion toward returning to prison (Tr. 59). Criterion H is concluded for Applicant.

The Government has met its burden with respect to Criterion J. Applicant has been convicted of five felony counts of selling cocaine and amphetamines. Trafficking in illegal drugs is very serious criminal activity even when done for a very brief period of time, on only an occasional basis. In this case, Applicant had been selling illegal drugs regularly for at least three years before she was arrested in October 1989. The seriousness of her crime is reflected in the 20 year prison sentence adjudged by the court. While she actually served only a year in prison, she will be on supervised probation for another four years.

Applicant receives little benefit from the mitigating conditions identified in the Adjudicative Guidelines. Although her arrest occurred almost eight years ago, Applicant's conduct is not mitigated

by the time that has passed because she stands convicted of very serious criminal activity. Applicant voluntarily participated in the regular--as often as daily--sale and distribution of dangerous illegal drugs for an extended period of time. As a consequence, she will be on supervised probation for another four years--after having already served several years of probation. The Appeal Board has ruled that "the more serious or long-term an applicant's conduct is, the stronger the evidence of rehabilitation needs to be to...overcome the negative security implications of that conduct." *See, e.g.,* ISCR Case No. 94-1055 (May 8, 1996) at page 4). Evidence of Applicant's rehabilitation is marred by her violating the conditions of probation less than two years ago. Her failure to comply with the requirements of her probation caused her to serve an additional 60 days in prison and now casts considerable doubt on the success of her rehabilitation.

Finally, it is difficult to determine if Applicant is now an acceptable security risk. Before her arrest and incarceration, Applicant--as a user and seller of drugs--was certainly not suitable to hold a security clearance. More recently, there is evidence that she has become a responsible and law abiding member of society. She has a job, and no longer uses or trafficks in illegal drugs. But Applicant is also serving a sentence of supervised probation.<sup>(2)</sup> Requirements of her probation include regularly reporting to a probation officer and submitting to random urinalysis. Under these circumstances, it is not possible to know whether Applicant has turned over a new leaf and is really a new, different and improved version of her former self, or whether her recent, exemplary behavior is a short-term, contrived strategy to comply with the requirements of probation in order to avoid going back to jail. This Administrative Judge cannot be confident that Applicant will be reliable and trustworthy in an unguarded moment when much of her behavior has been--and will continue to be-- subject to the scrutiny of a probation officer and random urinalysis. Criterion J is concluded against Applicant.

### FORMAL FINDINGS

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

Paragraph 1 (Criterion H) FOR THE APPLICANT

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. For the Applicant

Subparagraph 1.d. For the Applicant

Subparagraph 1.e. For the Applicant

Subparagraph 1.f For the Applicant

Paragraph 2 (Criterion J) AGAINST THE APPLICANT

Subparagraph 2.a. Against the Applicant

Subparagraph 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 continue Applicant's security clearance.

**John R. Erck**

**Administrative Judge**

1. There is no information in the file which indicates the level of clearance for which Applicant is applying, and Applicant herself did not know. Department Counsel opined that she was applying for a secret clearance (Tr. 61) and that level of clearance seems to be consistent with the type of work she is doing.
2. The Appeal Board has held that "a person on probation has an incentive to be on good behavior," DISCR OSD Case No. 86-4294 (May 16, 1988) p.3.