Date : September 30, 1997

In RE:

Applicant for security clearance

ISCR OSD Case No. 97-0193

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

Appearances

FOR THE GOVERNMENT

Martin H. Mogul, Esquire

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF THE CASE

On, March 7, 1997, 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, issued a Statement of Reasons (SOR) to Applicant, which 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 Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked. The SOR is attached. Applicant filed her answer to the SOR on March 24, 1997.

The case was received by the undersigned on July 16, 1997. A notice of hearing was issued on June 18, 1997, and the case was heard on July 22, 1997. The Government submitted five exhibits, and the Applicant submitted two exhibits. The Government called only the Applicant as a witness. Testimony was taken from Applicant, and three witnesses called by her. The transcript was received by me on August 7, 1997.

FINDINGS OF FACT

Applicant is a 47-year-old bench mechanic for a DoD contractor.

After a review of the transcript and documentary evidence, I make the following findings of fact:

As to SOR allegation 1, Applicant was arrested on December 13, 1993, for (Count 1) "Burglary," and (Count 2) "Forge Credit Card to Defraud." She was found guilty of burglary, sentenced to serve one day in jail, with credit for one day served; ordered to pay a fine of approximately $1,040.00 or perform 208 hours of community service in lieu of the fine; and awarded three years probation. Count 2 was dismissed.

As to SOR allegation 2, Applicant was arrested on August 8, 1995, for (Count 1) Welfare Fraud, a Felony, and Five Counts (Counts 2 - 6) of Perjury. She pleaded guilty to (Ct 1) Welfare Fraud, and was sentenced to serve 15 days in jail, to perform 300 hours of community service, to pay restitution of approximately $4,392.00, and awarded five years

probation. Counts 2 - 6 were dismissed.

Applicant admitted both allegations, with accompanying explanations.

As to the 1993 arrest, Applicant conspired with a friend to use an invalid credit card to obtain merchandise from a department store. Applicant's friend first purchased some items for herself, using the credit card, and then gave the card to Applicant for Applicant's use. Applicant attempted to use the card to purchase some items for herself (worth about $300), but was detained by store security and then arrested.

As to the 1995 arrest, Applicant conspired with another person to defraud the State, by obtaining welfare based on the fraudulent premise that she was a relative of a minor for whom she was allegedly providing care in her home.

POLICIES

General Policy Factors (Whole Person Concept)

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 sets forth generic adjudicative guidelines that must be carefully considered in making the overall common sense determination required. Each adjudicative decision must include an assessment of the seriousness, recency, frequency and motivation for an Applicant's conduct; the circumstances or consequences involved; the age of the Applicant; the presence or absence of rehabilitation; the potential for coercion or duress; and the probability that the conduct will or will not recur in the future. *See* Directive 5220.6, Section F.3. (as expanded in Enclosure 2, at page 2-1). I have considered and assessed each of the above factors in my overall evaluation of Applicant's security clearance suitability. I conclude that none of them, individually or collectively, points toward a finding favorable to Applicant as to her suitability for security clearance.

Because each security clearance case presents its own facts and circumstances, it should not be assumed that the factors 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.

Specific Criterion Factors

In addition to the General Guidance discussed above, an Administrative Judge must also evaluate the evidence under the specific Additional Procedural Guidance found at Enclosure 2 of the Directive (in this case, Criterion G, found on page 2-14). Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Criminal Conduct (Criterion J)

A history or pattern of criminal activity creates doubts about a person's judgment, reliability and trustworthiness.

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 offense.

Conditions that could mitigate security concerns include:

None

Under the provisions of Executive Order 10865 and the Directive, a decision to grant or continue an applicant's

clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required by the Directive, the Administrative Judge 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. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

A person who seeks 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 that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. EGA*, 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 the Court's rationale, doubts are to be resolved against the Applicant.

An Applicant's admission of the information in a specific allegation relieves the Government of having to prove that allegation. 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 Reason. If the Government meets its burden (by an applicant's admissions and/or by other evidence) and establishes conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the applicant. The Applicant must present evidence in refutation, extenuation or mitigation, sufficient to demonstrate that, despite the existence of the proven misconduct, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal standards and factors, and having assessed the credibility of Applicant's testimony, this Administrative Judge concludes that the Government has established its case as to both SOR Criterion J allegations. Because of the manner in which she answered each allegation, her admissions are deemed limited to the fact that she was arrested and sentenced as indicated in the SOR. The explanation that accompanied each admission indicates her belief that she was nonetheless innocent of violating the law in each case, despite the arrests and convictions.

In addition to concluding the Government has established its case, I conclude there is a nexus or connection between Applicant's criminal conduct and her suitability for access to classified information. The question remains whether Applicant has adequately mitigated or extenuated the impact of the Government's case.

THE 1993 ARREST

Applicant has provided different versions of what occurred leading up to each arrest. As to the 1993 arrest, in her March 24, 1997 response to the SOR, Applicant said that she and her friend "both found merchandise that we wanted and took it to the cash register. My friend said she would pay for the items with her credit card. The cashier said the purchase had been approved and we were waiting at the cash register [when] Security arrived and asked me to go to a back room. I had not noticed but my friend had left. I did not know anything was wrong with the credit card."

In her prior sworn statement to DIS, dated December 18, 1996, and at the hearing on July 22, 1997, Applicant stated that when it came time to pay for their respective purchases, her friend paid at another register and then gave the Applicant the same credit card, which Applicant then attempted to use at a second cash register, in another department, at which time she was arrested and she noticed her friend had disappeared. (Ex 2 and Tr at 38-41, 73-78).

At the hearing, Applicant added that the friend was actually going to sign the card, and that Applicant had merely taken the card from the friend to pass to the cashier, at which time Security arrived and the friend disappeared (Tr at 37, 75-76). Applicant added that the cost of her friend's purchases were part of the restitution that Applicant was required to make. Applicant claimed that she did not notice if her friend's name was on the card; that her friend was near her when she made the purchase for which she was arrested; that her friend was not detained by store security; that she told the

police but nothing was apparently done with the information; that her attorney never asked and the Applicant never told him about the friend; she saw her friend again about six months later and persuaded the friend to compensate Applicant for the restitution made by Applicant; but that the friend never explained why she got Applicant involved in the scheme. (Tr at 72-77). Applicant still felt that "it wasn't [her] fault." (Tr at 77).

Considering the inconsistencies and improbabilities found within Applicant's various explanations, it is impossible to accept Applicant's claim that she was an unknowing victim, taken advantage of by a faithless friend.

THE 1995 ARREST

As to the 1995 arrest, in her Personnel Security Questionnaire (Ex 1) and in her Response to the SOR, Applicant claimed that she "got involved in the fraud case through no fault of my own;" that "the child for whom she was claiming welfare was in her care because of a prior agreement with the child's mother; and that she pleaded guilty on the advice of her attorney, thinking the charge would later be reduced to a misdemeanor." (Response to the SOR).

Between the SCA and the Response to the SOR , Applicant gave a sworn statement to DIS on December 18, 1996 (Ex 2), in which she admitted she had been involved in the scheme to defraud the State. She made the same admission at the hearing, but could not explain why she had told different versions of the incident or why her response to the SOR contradicted the admission she had made to DIS only a few months earlier. (Tr 68,69). She did finally "accept responsibility for doing something [she] knew was not legal (Tr at 68) and admitted that the mother of the child and Applicant were "in on the fraud from the beginning, and they shared the money." (Id.).

Government Exhibit 4, the crime report relating to the 1994-1995 welfare fraud, establishes that applicant applied for and received public assistance for the minor child although not related to him or being his legal guardian, as required by law. Applicant's admissions at the hearing corroborate the initial evidence of her knowing involvement in the welfare fraud scheme.

Applicant's admissions as to the welfare fraud have an impact on the earlier credit card scheme, despite her denial of knowing involvement in the latter. Applicant's involvement in both matters contain striking similarities. As to both matters, Applicant had told different stories at different times. In each case, she originally claimed she was an innocent party taken advantage of in a criminal scheme by someone who was supposed to be her friend. In the welfare fraud matter, she finally admitted she was knowingly involved in the scheme. In the credit card theft matter, Applicant was unable to explain what the benefit would be to the person who gave Applicant the credit card or why that person would make Applicant an unwitting part of the criminal enterprise. Overall, the discrepancies and admissions made it impossible to give credence to Applicant's claims of innocence as to the circumstances surrounding both arrests.

I have considered the testimony of Applicant's witnesses. Ms. --, a friend of Applicant, likes the Applicant, and dislikes the mother of the child who was the basis for Applicant's request for public assistance. Ms. -- testified that the other woman lied about Applicant (Tr at 93). Ms. --'s explanations went into further detail than Applicant's own testimony (Tr at 94-98), but the impact of this witness's testimony is substantially minimized by the fact that Applicant has now admitted her knowing participation in the welfare fraud scheme.

I have considered the testimony of Ms. --, who is Applicant's sister. Ms. -- testified that Applicant submitted claims and received welfare checks for the minor child, even after the mother had moved out of Applicant's home. (Tr at 107, 111-114). Ms. -- also knows the friend who provided the credit card use by Applicant at the time of her 1994 arrest. Ms. -- testified that she had also used what was apparently the same credit card from the same friend who provided it to Applicant. The card was used to purchase gasoline when the friend was in Ms. --'s car. Nothing in s. --'s testimony refutes the evidence, including Applicant's admissions, that Applicant was knowingly involved in the welfare fraud scheme.

I have considered the testimony of Mr.---. He is a friend of Applicant and believes her to be a "good person." (Tr at 126). He remembers the minor child and his mother had lived with Applicant, and that the mother had called Applicant to ask about a welfare check. (Tr at 126). He remembers that Applicant told him "they say I was taking the money" but that she was not "doing anything wrong." (Tr at 130, 131). This testimony has little value as mitigation since it appears that Applicant told him she was innocent, while she has since admitted her knowing involvement.

At the conclusion of the hearing, I agreed to keep the record open for a week to allow Applicant to send me additional evidence she believed would be helpful. On July 24, 1997, Department Counsel received from Applicant a document I have marked as Applicant's D for identification. (Attached along with Department Counsel's objection). The document is one page from a multipage document (evidenced by the page number 14 in the upper right corner) in which Applicant mentions 1995 and 1994 arrests in ---------- and ----------, respectively. The citation of the 1995 arrest is accompanied by the explanation "Advice by attorney to plea guilty. See att. sheet." Department Counsel objects to the admissibility of the document because it "has no signature, no date and is not identified. Additionally, said documents do not demonstrate that Applicant had provide information to the United States Government of her arrest and conviction for credit card fraud as alleged in Criterion 1.a. of the Statement of Reasons in this case. This was the reason that the record was held open so that Applicant could offer this document into evidence."

Department Counsel is correct as to the specific reason the record was kept open (Tr at 87-88). The submitted document does mention a 1994 arrest that does not appear on her September 1996 Security Clearance Application (Ex 1). It is correct that the document is undated and unsigned. Because of Applicant's self-representation, I conclude it is appropriate to admit the document because it does reference a matter in question, but I also conclude it is entitled to minimal weight as evidence because it is undated and could have been prepared after the SCA rather than before the SCA and is unsigned by anyone. I note that Government Exhibit 5 documents the original proceedings resulting in the conviction that Applicant's Exhibit D indicates has been withdrawn and dismissed. Applicant's exhibit D does not change the basic premise that Applicant was knowingly involved in two different criminal conspiracies within two years of each other, and with the latter of the two schemes only two years ago.

I have also considered Applicant's four previous exhibits, also admitted into evidence. Exhibit A is a letter from a Police Department approving Applicant's operator's permit for Applicant's business enterprise. Exhibit B is a recommendation from a probation officer, approved by a judge, that Applicant's welfare fraud conviction be withdrawn, a plea of not guilty entered, and the case dismissed. The first page of the document is not attached but apparently contains the basis for the probation officer's recommendation. As I evaluate this document, Applicant has apparently fulfilled the requirements of her probation. In context, however, it corroborates that Applicant had been convicted of the felony of welfare fraud, as alleged in the SOR.

Exhibit C is a printout of a record from the school district in which Applicant apparently lived in 1994. It references the minor child for whom applicant had sought welfare and the child's mother. The record does not mention Applicant by name although it does reference the same street address as that shown on Exhibit 1 (the SCA)(as Applicant's residence in 1994). I evaluate this exhibit as showing that the minor child and his mother (listed as primary guardian) were supposedly living at Applicant's residence at some point in 1994. However, nothing in this exhibit mitigates Applicant's admitted involvement with the mother in the scheme to illegally obtain welfare based on the child's presence at the residence.

Exhibit D is a letter from the probation department stating that the early termination and dismissal of the welfare fraud conviction had been granted. It is a follow up to the recommendation found in Applicant's Exhibit B.

The Government has established its case under Criterion J. Applicant chose to become involved in two criminal schemes over the past four years. Her involvement violates the provisions of the DoD Directive governing security clearance eligibility and demonstrates a lack of integrity and good judgment required of anyone seeking access to classified information. Applicant's explanations and evidence do not carry the heavy burden of demonstrating mitigation or extenuation. Considering that the two criminal offenses occurred in 1993 and 1995, and the lack of any substantial evidence of rehabilitation, it is not now possible to conclude that such misconduct is unlikely to recur.

FORMAL FINDINGS

Paragraph 1. Criterion J: Against the Applicant

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

DECISION

In light of 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