

DATE: February 6, 1998

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In Re:

Applicant for Security Clearance

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ISCR Case No. 97-0334

## **DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M. SAX**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Martin H. Mogul, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **STATEMENT OF THE CASE**

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 3, issued a Statement of Reasons (SOR), dated May 9, 1997, to the Applicant that 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 and recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, denied or revoked.

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

On June 5, 1997, Applicant responded to the allegations set forth in the SOR and requested a hearing before a DOHA Administrative Judge. This case was originally assigned to another Administrative Judge but was reassigned to me on July 29, 1997. A Notice of Hearing was issued on September 15, 1997, scheduling the hearing for September 26, 1997. That date was vacated, at Applicant's request, because of a death in his family. A second Notice of Hearing was issued on December 31, 1997, rescheduling the hearing for January 13, 1998, on which date the hearing was conducted. I received the transcript on January 23, 1998.

### **FINDINGS OF FACT**

After a thorough review of all of the evidence in this case, including Applicant's responses to the SOR, and upon due consideration of all of the evidence in the case record, I make the following findings of fact as to the Criterion H (Drug Involvement) allegations in the SOR:

- Applicant is 30 years old and has been employed by a defense contractor as a hardware engineer since July 1996.
- Applicant used marijuana, with varying frequency, totaling about 50 times, from about 1980 to at least December 31, 1996. During the period from 1992 to 1996, Applicant used marijuana "no more than 10 times" (Transcript (Tr) at 27).
- Applicant purchased marijuana on "less than 10" occasions during his life, specifically when he was in the eighth grade, in 1980-1981 (Tr at 29).
- When interviewed by the Defense Investigative Service<sup>(1)</sup> (DIS) April 8, 1997, Applicant first stated that he

intended to use marijuana "in the future, depending on the circumstances" (Government Exhibit (GX) 2). Upon reading the completed statement about 19 minutes later, he changed his mind and stated that he intended not to use marijuana in the future (GX 3 and Tr at 46-52).

- Applicant used hashish on at least two occasions and cocaine on at least one occasion in about 1981.
- Applicant has the support of his work supervisor (Applicant's Exhibit (AX) A).

## 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 adjudicative guidelines that must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also 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. (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 and conclude that none of them, individually or collectively, requires a finding adverse to Applicant's suitability for security clearance.

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. Even though 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 poor 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, Criteria H). Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

#### Drug Involvement (Criterion H)

Improper or illegal involvement with drugs raises questions about an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of 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, manufacture, purchase, sale, or distribution.

Conditions that could mitigate security concerns include:

[as to allegations 1.b., 1.c., and 1.d.]

- (1) the drug involvement was not recent;
- (2) the drug involvement was an isolated or infrequent event;

[as to allegation 1.a]

(3) a demonstrated intent not to abuse any drugs in the future

In addition, 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, an 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, an 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. 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 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 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 Reason. Once the Government meets its initial burden of proof (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 to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within a specific criterion in the Directive, 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, I conclude that the Government has established its case as to all SOR Criterion H allegations, except as to allegation 1.b., where there is no record evidence of Applicant's purchase of marijuana after 1980/1981; i.e., not as late as December 1996, as alleged in the SOR. I also find there is a nexus or connection between the proven allegations about Applicant's use of illegal drugs and his eligibility for security clearance, since security clearance worthiness is a twenty-four-hour-a-day requirement. The question remains whether Applicant has adequately mitigated or extenuated the impact of the Government's case.

The direct information about Applicant's drug use comes from four primary sources: the Security Clearance Application (SCA) he signed on November 27, 1996 (GX 1), Applicant's two sworn statements to DIS on April 8, 1997 (GX 2 and 3), and his hearing testimony (Tr). In his November 1996 SCA, he answered "YES" to Question 27, pertaining to drug use, but cited only his use of marijuana on 50 occasions from 1983 to December 30, 1995 (GX 1). Other evidence indicates the correct date of last use was actually December 30, 1996 (GX 2 and Tr at 44). Applicant did not cite his use of hashish and cocaine in the SCA because their use occurred more than seven years prior to completion of the SCA (Tr 43, 44).

Applicant's purchase of marijuana in 1980/1981; his use of hashish on two occasions in 1981; and his use of cocaine on one occasion in 1981; are mitigated by the passage of some 17 years with no repetition. For these reasons, I conclude that Criterion H Mitigating Factors (MF) 1 and 2 apply as to SOR allegations 1.b., 1.c., and 1.d. The record evidence as to these three allegations does not establish a current history, pattern, or recurrence of any misconduct and are therefore no longer of security clearance significance.

It is Applicant's use of marijuana as late as December 1996 that raises the most serious issues as to Applicant's present eligibility for access to classified material. The record evidence (Tr at 18 - 29 and GX 1, 2, and 3) establishes Applicant's marijuana use as follows: (1) last use - December 31, 1996; identified previous uses: (2) 1993 -1996; three

to five times yearly; (3) 1986-1991, about 20 times while in college; and (4) more extensively from age 13 through high school. Applicant used marijuana on about 50 occasions in all (GX 1).

The evidence indicates occasional smoking of marijuana in social settings once every couple of months over the last ten years, with only a few uses over the several years preceding his last use in December 1996. I find Applicant's use of marijuana to have been occasional rather than regular and to have ended over a year prior to the January 13, 1998 hearing. In context, Applicant's use of marijuana "was not recent (MF 1) and was "infrequent" (MF 2).

The fundamental purpose of these proceedings is to predict likely future behavior based on past conduct and what is learned at the hearing. In this context, having considered Applicant's two statements as to his intent to use marijuana in the future, I find Applicant's explanations as to the thought processes that led him to first say "yes" and then "no" (GX 2 and 3 and Tr at 46-52) on this issue to be credible. Having considered the totality of the evidence and my evaluation of Applicant's demeanor at the hearing, I conclude that he had not really focused on the impact his marijuana use had on his life until he saw in writing what he had said to the DIS agent on April 8, 1997. His immediate reversal of a candid but immature statement about the possibility of future use of marijuana suggests a basic change resulting from his own thinking rather than from any pressure from outside sources.

As of the hearing, Applicant had demonstrated his intent not to use marijuana in the future by not smoking marijuana for over a year since last use and for eight months after his statement of intent not to use marijuana in the future. For these reasons, I find MF 3 to be applicable to SOR 1.a.

I have also considered Applicant's two exhibits. Exhibit A is from Applicant's work supervisor, who views Applicant as demonstrating "a strong work ethic, integrity [and an established] reputation of providing customers with credible, reliable information." There is no mention of Applicant's past use of illegal drugs. Exhibit B is a letter from a college roommate who also worked as a fellow employee of Applicant's first employer after college. The writer never "witnessed [Applicant] using any drugs."

In summary, the record evidence clearly establishes that each of the allegations in the SOR is correct, except that the date of last purchase of marijuana as alleged in SOR 1.b. should be 1980/1981 rather than December 1996. At the same time, Applicant's mitigating and extenuating evidence has demonstrated that Criterion H Mitigating Factors 1, 2, and 3 are applicable and override the impact of the Government's adverse evidence.

### **FORMAL FINDINGS**

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

2)

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

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

BARRY M. SAX

Administrative Judge

1. The Defense Investigative Service was renamed the Defense Security Service in late 1997.