

DATE: January 4, 1998

In Re:

SSN:

Applicant for Security Clearance

ISCR Case No. 97-0526

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 July 31, 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 interests of national security 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 August 20, 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 October 20, 1997. A Notice of Hearing was issued on November 4, 1997, scheduling the hearing for November 14, 1997, on which date the hearing was conducted. I received the transcript on November 25, 1997.

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, this Administrative Judge makes the following findings of fact as to the Criterion H (Drug Involvement), Criterion E (Personal Conduct), and Criterion J (Criminal Conduct) allegations in the SOR:

* Applicant is 34 years old and has been employed by a defense contractor since 1991.

* Applicant used cocaine, with varying frequency, at times weekly, from about January 1989 to at least 1993, and then at least once more in March 1997. Applicant purchased cocaine from about 1989 to at least 1993.

* Applicant used heroin in 1985 and 1986.

* Applicant was arrested on March 1, 1986 in state A, for Narcotic Possession (Heroin), a felony. Applicant had the heroin in her possession in a car after being given it by another individual. At the time of her arrest, Applicant removed the heroin from her pocket.

* Applicant used cocaine, after having been issued an interim Secret Department of Defense security clearance on October 10, 1996. In addition, Applicant used cocaine after she said, in a signed, sworn statement to DIS, dated February 5, 1997, that she would not use illegal drugs in the future.

* Applicant falsified material facts on a Security Clearance Application (SCA), signed by her on October 2, 1996. Specifically, as to Questions 21 (Have you ever been charged with or convicted of any felony?) and 24 (Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?), Applicant answered "No," when she had in fact been arrested on drug-related charges in arch 1986 and on charges unrelated to drugs in April 1986.

* Applicant falsified other material facts on the SCA signed by her on October 2, 1996. Specifically, as to Question 27, related to drug use, Applicant answered "Yes," but cited only "cocaine [use] six [times]" between January 1989 and January 1990. This answer was incomplete and only partially true.

* Applicant also lied in answering "No" to Question 29 on the SCA ("In the last 7 years, have you been involved in . . . the purchase . . . of any narcotic . . .?") when in fact, she had purchased cocaine "perhaps once a month" during the period from 1989 to 1993 (Tr at 22).

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, warrants a finding favorable 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, E, and J). 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:

None

Personal Conduct (Criterion E)

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, personal history statement, or similar form used to conduct investigations, . . . determine security clearance or trustworthiness . . . ;
- (3) deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel or trustworthiness determination;
- (4) personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or pressure; and
- (5) a pattern of dishonesty or rule violations.

Conditions that could mitigate security concerns include:

None

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

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, 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. 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. I note in this case that, although Applicant's response to the SOR admits only allegation 1.a., and denies all other allegations, during the hearing Applicant explained her denials and indicated that she did, in fact, admit all four of the Criterion D and E allegations previously denied (Tr at 49-52). 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, E, and J allegations. I also find there is a nexus or connection between the proven allegations and Applicant's eligibility for security clearance, since security clearance worthiness is a twenty-four-hour a day, seven day a week requirement. The question remains whether Applicant has adequately mitigated or extenuated the impact of the Government's case. For the reasons discussed below, I conclude that Applicant has not adequately demonstrated mitigation or extenuation.

The direct information about Applicant's drug use comes from four primary sources: the Security Clearance Application she signed in October 1996 (Ex 1), the two sworn statements to DIS (Ex 2 and 3), and her hearing testimony (Tr). In her SCA, she answered "YES" to Question 27, pertaining to drug use, and admitted to using cocaine on six occasions between January 1989 and January 1990. Her description of her use of cocaine was incomplete and untrue. In her first sworn statement, dated February 5, 1997, Applicant admitted to the use of cocaine at the level of "a quarter grain a week by inhalation only, bought off the street, and discontinued the use in 1993" (Ex 3). She also claimed an intent not to use any illegal drugs in the future (Id.). This sworn statement establishes that she lied about the extent of her drug use in the SCA.

In her second sworn statement, dated May 29, 1997 (Ex 2), she stated she had purchased cocaine "maybe once a month" during the period from 1989 to 1993, thus demonstrating that she had lied about purchasing drugs when completing the SCA, when she answered "NO" to Question 29. She also admitted that she had used cocaine at a party in March 1997, which was after she had completed her SCA, after she had received an interim clearance (Tr at 23), and after she had provided the first sworn statement to DIS, during which she stated her intent not to use drugs again. She admitted lying about her drug use in the SCA because she was afraid she "would not be granted a security clearance" (Ex 2).

In her hearing testimony, Applicant admitted to the use of cocaine about every other weekend from about 1989 to 1993 (Tr at 21, 22) and that she had purchased cocaine "maybe once a month" at about \$40 a purchase (Tr at 22). She admitted the use of cocaine "one additional time in March of 1997," claiming it was "just a bad judgment on my part" (Tr at 23). On a number of occasions, Applicant had tried to stop using cocaine but then starting again, for reasons she was "not sure" of (Tr at 25). Over the years, she used cocaine about "25 or 26 times a year for three or four years" (Tr at 48) and she spent about \$3,000 on cocaine purchases (Tr at 26).

Applicant also explained that at the time of her 1986 arrest for possession of heroin, another passenger in the car had the heroin but had "handed it to me." (Id.). At the hearing, Applicant explained that the other person had "stuffed" the heroin into Applicant's pocket during the stop by police but that the police apparently saw this and asked Applicant to empty her pockets, at which time the heroin was revealed. At the time of the arrest, Applicant did not tell the police that the heroin belonged to the other person (Tr at 48-51). I find her explanation for this arrest to lack credibility.

Although not alleged in the SOR, the applicant admitted to using marijuana when she "was a teenager. . . between "

[19]76 and [19]81"(Tr at 28, 29).

Applicant also admitted the substance of allegation 2.a.(2) in that she issued about 10 checks to a department store in exchange for merchandise, when she knew there were insufficient funds in the bank account to cover the checks. The express purpose of these actions was to "purchase merchandise and then take them back and receive cash" (Tr at 31, 32). She knew this conduct was against the law (Tr at 33).

Applicant's hearing testimony was sometimes confusing and contradictory, as she sought to explain her previous statements as to what she did and why. At one point, she claimed that it "wasn't [her] intention to give misinformation to the government. [She just] didn't want to be denied a clearance" (Tr at 41). She also admitted, however, that she "

believe[d] that if [she] had been totally truthful that would keep [her] from getting a security clearance" (Id.). At the same time, Applicant also claimed that she falsified her answers to the cited SCA questions based on advice given her by "a security official" at her firm, despite the specific language of the SCA (Tr at 39). Applicant stated that she lied to the DIS agent during the first interview because Applicant "didn't like the way [the DIS agent] went about her questions, her mannerisms toward me. It seemed like she had already made her mind up of what kind of person I was before I even got there . . ." (Tr at 80). In explaining the apparent lack of use of cocaine from 1993 to March 1996, Applicant stated she "just didn't feel like [she] should be using it at all (Tr at 45) during this period, but at a party in March 1997, at which she was present with her husband, she again used cocaine but wasn't sure if her husband also used cocaine. Nothing in Applicant's explanation even suggests why she then provided false information in her sworn statement. Overall, her explanation lacks adequate support in the record to outweigh the substantial negative evidence found in the record.

Considering all of the record evidence, and applying the "whole person" concept on which DOHA determinations are based, I conclude that Applicant's drug involvement was not an aberration or even experimental, but rather, was a part of her overall character and/or life style until recently. I note her use of marijuana and heroin, and particularly her extensive use and purchase of cocaine, continued over a period of years. It is also important to note that she last used cocaine only about eight months prior to the date of the hearing.

I also considered Applicant's other criminal activity, the passing of at least 10 bad checks in 1986, wherein Applicant obtain cash from merchants by purchasing merchandise using bad checks and then returning the merchandise to the store for cash (Tr at 32-34). It is true that this activity is more than 11 years old. If there were no other negative information, this act of misconduct would probably have been mitigated by the passage of time. However, in context, it occurred after she first started using marijuana and shortly before Applicant's first use of cocaine. It also provides a starting time for a pattern of misconduct involving involvement with illegal drugs and the intentional falsification of her SCA and first sworn statement to DIS.

In summary, the record evidence clearly establishes that each of the allegations in the SOR is correct and that all of the Disqualifying Factors cited above are applicable. At the same time, nothing Applicant has said or done has demonstrated either (1) an understanding of the concerns her history and pattern of misconduct have caused the Government in the context of her eligibility for access to classified information or (2) her rehabilitation from her use of illegal drugs. I conclude that none of the possible Mitigating Factors found in the Additional Procedural Guidance provisions for Criteria H, E, and J found in Enclosure 2 of the Directive are applicable under the facts of this case. Even granting Applicant's sincerity at the hearing in promising no future drug use, she has made this statement before, in January 1997, and was not able to fulfill her promise. At the very least, more time and a greater effort in demonstrating rehabilitation is required before the Government can have the required level of confidence in her ability to protect the nation's secrets.

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 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

Paragraph 2. Criterion E Against the Applicant

Subparagraph 2.a.(1) Against the Applicant

Subparagraph 2.a.(2) Against the Applicant

Subparagraph 2.b.(1) Against the Applicant

Subparagraph 2.c. Against the Applicant

Paragraph 3. Criterion J Against the Applicant

Subparagraph 3.a. Against the Applicant

Subparagraph 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