

DATE: April 3, 1998

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In Re:

Applicant for Security Clearance

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ISCR Case No. 97-0673

**DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M. SAX**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Department Counsel

**FOR APPLICANT**

Thomas H. Malowney, Esquire

**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 November 3, 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. In his November 3, 1997 response to the SOR, Applicant requested a hearing before a DOHA Administrative Judge.

In his response to the SOR, Applicant admitted all SOR allegations (1.a.-1.q. and 2.a.-2.d.). The admissions of SOR 1.m. and 2.a.-2.d. were accompanied by additional comments. A copy of the SOR is attached to this decision and is included herein by reference.

A Notice of Hearing was issued on January 9, 1998, scheduling the hearing for January 30, 1998, on which date the hearing was conducted.

The Government questioned Applicant as part of its case but did not call any other witnesses. The Government submitted 16 exhibits (GX), 1 - 16, that were admitted into evidence.<sup>(1)</sup> Applicant then testified on his own behalf and called one other witness. Applicant also submitted 16 exhibits,

(AX) A-P, that were admitted into evidence.<sup>(2)</sup>

I received the transcript on March 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, this Administrative Judge makes the following findings of fact relevant as to the Criterion H (Drug Involvement) and Criterion J (Criminal Conduct) allegations in the SOR:

- Applicant is 32- years-old, and has been employed as a software engineer by a defense contractor since 1996.
- SOR 1.a., 1.b., and 1.c. - Applicant used methamphetamine (with varying frequency and at times twice a day) and purchased methamphetamine from about 1992 to approximately August 1994. He sold amphetamine to support his habit, from about 1992 to 1994.
- SOR 1.d., 1.e., 1.f., and 1.g. - Applicant used and purchased marijuana from 1990 to 1994 (per his admission in his response) and "previously to that" (Tr at 86. ; In addition, he sold marijuana during the same period to support his habit, and attempted to cultivate marijuana.
- SOR 1.h. and 1.i. - Applicant used heroin in at least 1993 and psilocybin mushrooms in at least 1992.
- Although not alleged in the SOR, Applicant used LSD and PCP in 1984/1985 (Tr at 92).

Applicant was arrested on the following occasions :

- SOR 1.j. - June 23, 1990, in state A, for Possession of Marijuana. Applicant pleaded guilty and was sentenced to six months in a diversion program;
- SOR 1.k. - January 20, 1993 in city B, for Spousal Abuse, a felony under state law. The charge was reduced to a misdemeanor and a warrant was issued on April 14, 1993 for failure to appear in court. Applicant was subsequently ordered to attend a Domestic Violence Program, sentenced to 180 days in jail with credit for 5 days served, and awarded three years probation. Applicant had used methamphetamine just prior to this arrest. Applicant had been arguing with his "live-in" girl friend, and punched her several times in the face, causing bruises (GX 3 and 4). An arrest warrant was issued because Applicant failed to attend a work furlough course, and Applicant was arrested on the warrant on January 14, 1994 (GX 15).
- SOR 1.l. - May 4, 1993, in city B, for Possession of a Controlled Substance. Applicant pleaded guilty. He was sentenced to serve 10 days of "Public Service," and was ordered to pay fines/costs of about \$330. Applicant admitted to the arresting officer that he had just purchased the methamphetamine found in a container hanging around his neck (GX 5 at p. 4, 6, and 7).
- SOR 1.m. - June 3, 1993, in city B, for (1) Possession of Controlled Substance for Sale; (2) Under the Influence of a Controlled Substance; and (3) Unlawfully Driving a Vehicle without a License. Applicant was detained and then released; Count (1) was dropped, and Counts (2) and (3) were retained. Applicant was in possession of five baggies of methamphetamine (totaling 8.5 grams), a "coke" pipe, a scale, 13 empty baggies, a mirror, a straw, and a spoon at the time of this arrest. As a condition of the probation imposed by the court on May 17, 1993, Applicant was ordered not to use any controlled substances (GX 4 at p. 5).
- SOR 2.b. - At the time of the June 3, 1993 arrest, Applicant gave the police the name of his brother rather than his own. As of August 1997, Applicant had not contacted the court to provide correct information. However, by the hearing date, Applicant had done so (GX 4, 6, and 7).
- SOR 1.n. - November 8, 1993, in city B, for (1) Driving a Vehicle While Under the Influence of an Alcoholic Beverage or a Drug or Under Their Combined Influence; (2) Under the Influence of a Controlled Substance; and (3) Unlawfully Driving a Vehicle without a License. Applicant pleaded guilty to Count (1) and a lesser charge of Count (2). Applicant was sentenced to serve 180 days in jail, suspended for five years, to pay fines and costs of approximately \$1,100, and awarded five years of probation. Count (3) was dismissed. This criminal activity also violated the terms of probation imposed as a result of the June 1993 arrest cited above in SOR 1.m. (GX 9).
- SOR 2.c. - At the time of his November 8, 1993 arrest, Applicant gave the police a false name as his own, in order to avoid an outstanding arrest warrant. As of August 1997, Applicant had not returned to court to provide truthful information. However, by the hearing date he had done so and the warrant was withdrawn.
- SOR 1.o. - June 22, 1994, for (1) Transport of a Controlled Substance; (2) Possession of a Controlled Substance for Sale, Felony; (3) Possession of a Controlled Substance; and (4) Possession of Drug Paraphernalia. Applicant pleaded Guilty to Count (1), was sentenced to pay fines/costs of about \$550, awarded five years supervised probation, and sentenced to one year in jail, stayed pending completion of a rehabilitation program. Counts (2), (3), and (4) were dismissed (GX 11).
- SOR 1.p. and 1.q. - Applicant received counseling (1) from August 16, 1994 to August 20, 1995 at a rehabilitation center in city A, in a program for chemically dependent men (GX 12); and (2) from February 20, 1995 to at least November 20, 1995 at a Recovery and Referral Center in city A, in a program for recovering drug addicts (GX 13).
- SOR 2.a. - In addition to the drug-related arrests that were the basis for SOR 1.j., 1.k., 1.l., 1.m., 1.n., 1.o., 2.b., and 2.c., and the drug-related and other criminal conduct for which he was not arrested, SOR 1.a. -1.i., above,

- Applicant used false names when arrested on two occasions in 1993, as alleged in SOR 1.m. and 1.n., above.
- SOR 2.d. - Applicant was arrested in October 2, 1996, in city A , for an act of domestic violence that occurred in late May or early June 1996. The victim was the same female Applicant abused in January 1993 (SOR 1.k.) As reflected in the police report (GX 14), the victim had bruises on the back of her neck and both arms. Applicant's probation for the domestic violence arrest set forth in SOR 1.k., above, was extended to November 1997.
  - Applicant has received considerable support from health care professionals, work colleagues, friends, and religious associates, commenting on his struggle to overcome his drug-related problems and his job performance (AX A - Q).

## 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 (a) the seriousness, recency, frequency and motivation for an Applicant's conduct; (b) the circumstances or surrounding the conduct; (c) the frequency and recency of the conduct; (d) the age and maturity of the Applicant at the time of the conduct; (e); the voluntariness of participation; (f) the presence or absence of rehabilitation and other pertinent behavior changes; (g) the motivation for the conduct; (h) the potential for pressure, coercion, exploitation, or duress; or (i) the likelihood of continuation or recurrence (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.

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 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)

##### Disqualifying Conditions

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

##### Mitigating Conditions

- (3) A demonstrated intent not to abuse any drugs in the future;
- (4) Satisfactory completion of a drug treatment program prescribed by a credentialed medical professional.

#### Criminal Activity (Criterion J)

##### Disqualifying Conditions

- (1) Any criminal conduct, regardless of whether the person was formally charged;
- (2) A single serious offense or multiple lesser offense.

### Mitigating Conditions

None that are applicable under the facts of the present case.

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 I understand 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 an Applicant, the Government has the initial burden of proving those controverted facts alleged in the SOR. I note in this case that Applicant, in his response and at the hearing, admitted *all* of the SOR allegations.<sup>(3)</sup>

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 of the SOR allegations. I also find there is a nexus or connection between the proven allegations of the history of drug involvement and criminal conduct that Applicant has engaged in from 1990 to the recent past, since such misconduct is incompatible with maintaining a security clearance. The question remains whether Applicant has adequately mitigated or extenuated the impact of the Government's case.

I have studied Applicant's statement to the Defense Investigative Service (DIS) (GX 15), dated August 6, 1997.<sup>(4)</sup> I have also studied Applicant's hearing testimony. Prior to the hearing, Applicant had not been completely truthful about his drug involvement. It was not until the hearing that Applicant admitted using LSD and PCP as early as 1984/1985. Prior to that point, Applicant had insisted that he had used drugs only during the period from 1990 to August 1994, during which period, he used, purchased, and sold methamphetamine and marijuana; and used heroin and psilocybin mushrooms in 1992/1993.

Applicant's admitted involvement with the cited illegal drugs is aggravated by an arrest for possession of marijuana in 1990 (SOR 1.j.); three drug-related arrests in 1993 (SOR 1.k - 1.m.), and a fourth drug related arrest in June 1994 (SOR 1.o.). Although not tied directly to any drug use, Applicant was arrested the fifth and last time in October 1996 (SOR

2.d.), on charges involving domestic violence against the same victim involved in SOR 1.k.

I also find significant Applicant's statement that he stopped smoking marijuana around 1993 only because it was interfering with the enjoyment he received from using methamphetamine (GX 15 at 2) and that he stopped using methamphetamine around August 1994 because of his arrest for possession of methamphetamine (GX 10).

The negative effect of the above drug-related misconduct on Appellant's security clearance eligibility is compounded by Applicant's use of false names during his June 1993 and November 1993 drug-related arrests (SOR 2.b. and 2.c.). As late as August 1997, when he was asked about the false names by the DIS agent, Applicant had made no effort to contact the court to provide correct information and to resolve outstanding warrants based on Applicant's failure to appear in each case.

He finally did so after the meeting with the DIS agent (Tr at 60-62), by going to court on January 27, 1998 and explaining the matter to the court (AX P).

Considered under the "whole person" concept on which security clearance determinations are based, Applicant's conduct demonstrates character unacceptable in someone seeking access to the nation's secrets. In terms of their present applicability, Applicant's acts of misconduct began as early as 1984/1985 and from at least 1990 through at least January 1998, when he finally took steps to correct the false names he had given police in his June 1993 and November 1993 drug-related arrests.

In his opening statement at the hearing, counsel for Applicant admitted that in 1992-1994, applicant had been "anything but a model citizen" but that "since 1994, [Applicant] has demonstrated a responsible and productive outlook towards life"(Tr at 24). This statement is necessarily based on minimizing the impact of the October 1996 arrest for Domestic Violence and Applicant's failure to clear up the legal problems caused by his providing false names to the police and court until after being confronted by DIS in August 1997. I conclude, however, that Applicant's exercise of poor judgment and irresponsibility in the context of his eligibility for as security clearance has continued until shortly before the hearing. It is clearly a positive factor that he has corrected his earlier lies, but the evidentiary value of the information is minimized because Appellant acted many months after he learned that DIS knew about the lies, and only under the pressure of an impending hearing.

The October 1996 arrest is documented by GX 14, a Crime/Incident Report. The reports's synopsis indicates that Applicant used his hands to inflict injury and to pull the female victim's hair, and that he "bruised and battered his ex-girlfriend." The victim's complaint was made a week after the assault, but the report indicates the reporting officer was still able to observe "black and blue bruising marks to both inner and outer sides of both arms, near the elbow" and the victim reported both "pain and a bump to right lower side of her head."

In Applicant's testimony about the circumstances of the October 1996 arrest, Applicant described his concern with what he saw as the victim's involvement with drugs and the effect on the children. He states that he asked her to stop using drugs and that she followed him outside and physically assaulted him (Tr at 65). Applicant admits pulling the victim's hair but says he did it to get her off of him (Id.). Applicant admits kicking the victim's door but claims it was on a day several months prior to the incident leading to his arrest (Tr at 66, 67, 90). According to the Applicant, the matter was dismissed in court because there was insufficient evidence of the assault but his probation on the earlier arrest was extended because he had kicked the victim's door (Tr at 70). The probation was finally terminated in December 1997 (Tr at 71).

I have compared Applicant's statements as to what happened during the 1996 arrest incident the contents of police reports about the 1993 and 1996 incidents. I have considered also the new information from Applicant that there were actually two incidents in 1996, the one for which he was arrested and one where Applicant had kicked and damaged the victim's door. I note that both incidents occurred after Applicant's drug-related treatment in 1994 and 1995 (SOR 1.p. and 1.q.). Even accepting Applicant's claim that the victim of all three incidents had problems of her own, overall, the record compels the conclusion that it is more likely than not that Applicant had acted improperly in the last incident, despite the fact that the court may have concluded there was insufficient evidence to proceed with a criminal case. The admitted criminal conduct demonstrated by the evidence supporting the Criterion J allegations at SOR 2.a. - 2.d. extends over a considerable period of time and continued until recently.

Based on the above information; i.e., a history of criminal conduct, a lengthy period of drug involvement, and a failure to report the false names until three days before the hearing, I am unable to conclude that Applicant's criminal conduct, drug-related or otherwise, is no longer of security clearance significance.

I have considered the testimony of Dr A, PhD, who is a clinical psychologist and a B.A. in Theology. He is the Director of the drug rehabilitation program that Applicant attended from August 1994 to October 1995 (Tr at 40). Testifying as an expert, he concluded that Applicant had "made progress" and "clearly over a number of years demonstrated himself as being very responsible and dependable and reliable (Tr at 36). He offered a prognosis for Applicant's future sobriety as being "very good based on behaviors and choices he's made over these number of years (Tr at 48). He was not aware that Applicant had been arrested for domestic violence in 1996, about he completed the drug program (Tr at 41).

I have considered the testimony of Mr. B, the assistant pastor of Applicant's church. He has known Applicant for about three and a half years (Tr at 50). He is aware of Applicant's past drug problems but views him as unlikely to return to any criminal or drug-related activity (Tr at 53). He trusts Applicant and has no reservations about recommending Applicant for a security clearance (Id.).

I have also considered all of the documentary evidence presented by Applicant. Applicant's exhibit A is a collection of court documents, dated January 16, 1998 with attachment, indicating that custody of their children was to be given to Applicant rather than their mother, the victim in the two cited domestic violence arrests. Ex B is a January 12, 1998 letter from Dr. B, Ph.D. (The same person who prepared the attachment to Ex. A). Dr. A views Applicant as "presently a responsible, conscientious, and intelligent individual who has made a very serious commitment toward his recovery from a very serious drug problem." In addition, Dr. A "was significantly impressed by what appears to be a genuine and significant change in his functioning."

Exhibit C is an October 1996 letter of commendation from the pastor of Applicant's church.

Exhibit D, E, and F are, respectively, June 1997, October 1996, and September 1996 letters of recommendation from three work supervisors. Exhibits G and H, respectively, are October 14 and 18, 1996 letters from two rehabilitation centers praising Applicant's completion of the treatment and successful follow up. Exhibit I documents three negative drug test results in August, November, and December 1997. Exhibits J and P document the termination of Applicant's probation in December 1997. Exhibit K is an August 1997 court document showing the completion of Applicant's community service.

Exhibit L is a January 29, 1998 letter of support from a chemical dependency center. It states that Applicant has "demonstrated his strong commitment to full rehabilitation and stabilization in the past three years." Exhibit M is a January 29, 1998 letter of recommendation from Applicant's Facility Security Officer. Exhibit N is a January 29, 1998 letter of support from his present supervisor. Exhibit O is a document showing negative drug test results in August and September 1997. Exhibit Q is a highly complimentary February 1998 memo of support from the Executive Director of the sober living facility where Applicant has resided. He views Applicant an "excellent role model" for others with substance abuse problems.

Most of Applicant's exhibits and the testimony of his two witnesses relate to his drug problems, alleged under Criterion H in the SOR. The evidence indicates that Applicant's last use of any controlled substance was about three and a half years ago. The record also contains strong support in personal recommendations and recent professional evaluations. Based on the passage of time and clear indications of rehabilitation, I conclude that Applicant is not likely to return to his old drug habits

The problems remain. however, as to Applicant's criminal and related conduct. Applicant's exhibits do not apply directly to this issue and do not outweigh the serious nature of the misconduct admitted by Applicant. Criminal conduct is of security concern because it demonstrates an unwillingness and/or inability to comply with the laws and rules of our society. I am concerned with the nature and extent of Applicant's drug and non-drug related criminal activity, the relative recency of his last arrest, and his failure to correct past falsifications about his name when arrested in 1993 until shortly before the hearing. The evidence compels the conclusion that, despite his no longer using drugs, he has not yet rehabilitated himself as to managing his anger and meeting his responsibility to tell the truth to local and federal

officials. He has not carried his heavy burden of demonstrating that the Government can have the level of confidence in Applicant required of anyone seeking access to the nation's secrets.

I have considered the applicability of all pertinent disqualifying and mitigating factors. The disqualifying factors cited above are clearly established by the evidence as to both cited criteria. As to Criteria H, I find sufficient evidence of mitigation and extenuation to conclude that Applicant has overcome the Government's evidence. However, as to Criterion J, I conclude that Applicant has not carried his burden of demonstrating mitigation or extenuation as to any of the four criminal-related SOR allegations. 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 Applicant's 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 (Drug Involvement)

All allegations 1.a. - 1.q. For the Applicant

Paragraph 2. Criterion E

All allegations 2.a. - 2.d. 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. By stipulation between the parties, dated January 12, 1998 by Applicant and December 30, 1997 by Department Counsel, the Government's 16 exhibits were agreed to be admissible and were accepted into evidence by me at the hearing.
2. By stipulation between the parties, signed by counsel for Applicant on January 26, 1998 and by Department Counsel on January 30, 1998, 11 Applicant's exhibits were agreed to be admissible into evidence. At the hearing, five additional Applicant's exhibits were added to the stipulation. The designations given Applicant's 11 original exhibits (1 - 11) were redesignated by me with letters (A - K) and the additional five exhibits offered at the hearing were designated exhibits L - P). Another document was submitted by Applicant after the hearing, to which Department Counsel did not object. This document was admitted as Exhibit Q.
3. In his response to the SOR, Applicant added comments to his admissions as to SOR 1.m., and 2.a.- 2.d.. The comments do not affect the accuracy of the SOR as written but, rather, cite subsequent action by Applicant as to each allegation.
4. The statement is signed by the DIS agent but unsigned by Applicant. Based on Applicant's stipulation that GX 15 be admitted into evidence, the DIS agent's testimony as to the circumstances of taking the statement from Applicant, and in the absence of any controversy on this point, I deem Applicant to have admitted the statement was given by him.