

**Date: April 9, 1998**

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**In Re:**

**Applicant for Security Clearance**

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**ISCR Case No. 97-0709**

**DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M. SAX**

**APPEARANCES**

**FOR GOVERNMENT**

**Melvin A. Howry, Department Counsel**

**FOR APPLICANT**

*Pro Se*

**STATEMENT OF THE CASE**

On October 27, 1997, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense (DoD) Directive 5220.6 (Directive), dated January 2, 1992, as amended by Change 3, issued a Statement of Reasons (SOR) 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 a clearance should be granted, denied or revoked.

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

On October 31, Applicant responded to the allegations set forth in the SOR. Applicant elected to have the case determined by an Administrative Judge on the written record, i.e., without a hearing (Government Exhibit (GX) 3). A File of Relevant Material (FORM) was issued by Department Counsel on February 6, 1998. Applicant was notified that she could respond to the FORM within 30 days of her receipt of the FORM. Applicant submitted a response to the FORM (with five attachments) on February 24, 1998. This case was assigned to me for resolution on March 16, 1998.

**FINDINGS OF FACT**

The Government opposes the Applicant's request for a continued security clearance, based on the allegations set forth in the attached SOR, under Criterion H (Drug Involvement), Criterion E (Personal Conduct), and Criterion J (Criminal Conduct). After a thorough review of all of the evidence in this case, including Applicant's responses to the SOR and to the FORM, and upon due consideration of all of the record evidence, including Applicant's admissions and explanations, and all of the documentary evidence, I make the following findings of fact as to the Criteria H, E, and J allegations in the SOR:

\* Applicant is a 37-year-old database manager/office administrator. She has been employed by a defense contractor since May 1994. Applicant's employer is seeking a Secret level security clearance for Applicant.

\* In her response to the SOR, Applicant admits Criterion H allegations 1.a., 1.b., 1.c., 1.d., and 1.e. (with explanations); and Criterion E allegations 2.a. and 2.b. (with explanations). Applicant does not specifically admit or deny the single

Criterion J allegation, but she does provide an explanation. In the absence of an admission, I deem her response to be a denial of the allegation as stated in the SOR.

As to the specific SOR allegations, I find the following:

- \* Allegation 1.a. - Applicant used marijuana, with varying frequency, at times daily, from about 1976 to at least the period from November 1995 to February 1996 (GX 3, 5 and 6);
  - \* Allegation 1.b. - Applicant attempted to cultivate marijuana, in about 1977 (GX 3 and 6);
  - \* Allegation 1.c. - Applicant used crystal methamphetamine one time, in 1991. [\(1\)](#)
  - \* Allegation 1.d. - Applicant used opium approximately one time, in 1977, when she was in high school (GX 3 and 6);
  - \* Allegation 1.e. - Applicant used amphetamines (White Crosses and Black Beauties) on one occasion, in about 1977, when she was in high school (GX 3 and 6);
  - \* Allegation 2.a. - Applicant intentionally falsified material facts on her Questionnaire for National Security Positions (SF 86), dated October 1996, when she answered "No" to Questions 24.a., about any past drug use in the past seven years or since the age of 16. She intentionally failed to report her use of marijuana or crystal methamphetamine, as alleged in SOR 1.a. and 1.c., because she was "scared of not getting [her] clearance" (GX 3);
  - \* Allegation 2.b. - Applicant intentionally lied to the Defense Investigative Service (DIS) in a sworn statement, dated January 21, 1997, when she intentionally denied using marijuana since her high school days and denied ever using any other illegal substance, as alleged in 1.a., 1.c., 1.d., and 1.e. She lied because she was "scared of not getting [her] clearance" (GX 3) and she "didn't tell the whole truth because [she] didn't think anyone would find out" (GX 6).
- She finally told the truth in her second interview with DIS, on September 17, 1997, because she "knew the [pending polygraph examination] would find out [the truth]"(GX 6).
- \* Allegation 3.a. - Applicant's intentional falsification of both the SF 86 (GX 4) and first sworn statement to DIS (GX 5) were violations of 18 U.S.C. 1001.

### POLICIES

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, as amended by Change 3, sets forth specific adjudicative guidelines that must be carefully considered according to the pertinent criterion in making the overall common sense determination required. In addition, each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

CRITERION H (DRUG INVOLVEMENT)

Improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Drug involvement or dependence may impair the risk of unauthorized disclosure of classified information. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

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

- (1) any drug abuse;
- (2) illegal drug possession, including cultivation, processing, manufacture, sale, or distribution;

Conditions that could mitigate security concerns include:

- (1) the drug involvement was not recent;
- (2) the drug involvement was an isolated or infrequent event;
- (3) a demonstrated intent not to abuse any drugs in the future.

CRITERION E (PERSONAL CONDUCT)

Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

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

- (2) the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . . used to conduct investigations, determine employment qualifications, award benefits or status, *determine security clearance eligibility or trustworthiness*, or award fiduciary responsibilities. (emphasis added)
- (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 security or trustworthiness determination.
- (4) personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or pressure;
- (5) a pattern of dishonesty or rule violations.

Conditions that could mitigate security concerns include:

None

CRITERION J (CRIMINAL CONDUCT)

A history or pattern of criminal activity creates doubt 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 offense or multiple lesser offenses.

Conditions that could mitigate security concerns:

None

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it 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.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for a security clearance may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability on the part of an Applicant. These concerns include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations 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 Reasons. If the Government meets its burden (either by an Applicant's admissions 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 specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

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.

### CONCLUSIONS

In her response to the SOR, Applicant admitted, with qualifications and/or explanations, all of the Criterion H allegations. Considering all of the record evidence, it is apparent that Applicant's use of marijuana, as alleged in SOR 1.a., continued, to varying degrees, for more than two decades, generally in the context of her marriage. She claims that her marijuana use ended after her divorce. Her response to the SOR gives the date of last use as November or December 1995, while her September 17, 1997 statement to DIS (GX 6) gives the date as February 1996.

She claims the cultivation of marijuana (SOR 1.b.) occurred once, "when [she] was 15 years old, 21 years ago" (GX 3), but "it died" (GX 6). Her one time use of crystal methamphetamine occurred in either 1994 (GX 6) or 1991 (GX 3). Her use of opium was limited to a single episode in 1977 (GX 3 and 6). Her use of amphetamines occurred about 20 years ago, when she was in high school (GX 3 and 6).

Applicant's overall use of illegal drugs, began 20 years ago and ended a little more than two years ago, with marijuana as her drug of choice. The only other drug use in the 1990s, her one-time use of crystal methamphetamine, occurred about four years ago. She used it in an attempt to lose weight, but she did not repeat the use "because it hurt her nose very badly" (GX 3).

Her marijuana use, because of its extent and recency, is of the most serious security clearance significance. She stated that she stopped in late 1995 or early 1996 when she became pregnant with her son (GX 6) and she has "no intention of

using it now or in the future" (GX 6). There is no evidence of any drug use since at least early 1996. While any drug use is particularly inappropriate for one seeking access to the nation's secrets, the evidence suggests the likelihood that she will not repeat her past drug involvement. As to all Criterion H allegations, while DF (1) and (2) have been established by the evidence, the record also indicates that her drug involvement during the 1990s was infrequent and not particularly recent: i.e., at least two years ago (MF 1 and 2). By her testimony and the passage of time, she has demonstrated an "intent not to abuse any drugs in the future" (MF 3).

The more significant misconduct as to her present security clearance suitability involves her intentional falsifications of both her Questionnaire for National Security Positions (GX 4) and her July 21, 1997, sworn statement to DIS (GX 5). Second only to direct violations of rules and regulations pertaining to the protection of classified material, falsifications of information relevant and material to the granting or denial of a security clearance go directly to the heart of the process and cannot readily be ignored.

In this case, there is absolutely no question that Applicant intentionally lied on both of the above occasions, and that she finally told the truth only when she was facing a polygraph examination, which she thought would reveal the truth (GX 6). Her reasons for lying in the first place were that she "was scared of not getting [her] clearance" (GX 3) and, specifically as to her lies to DIS in her first statement, that "[she] didn't think anyone would find out" (GX 6).

The FORM prepared by Department Counsel on February 6, 1998, contained all the exhibits on which the SOR was based and gave fair notice to Applicant as to what she previously had said about both her drug use and falsifications. In her response to the FORM, are letters from the President/CEO and Vice-President of her employer, letters from two acquaintances, and a form showing a negative test for drugs. The first letters view Applicant as "reliable [and] trustworthy" in handling "company proprietary information" and showing "responsible and positive behavior." The second two letters present positive views of Applicant's character and competence. The last document shows no drugs in her system as of February 1998. I have considered all of this new material.

As positive as the new material is, none of it mitigates the nature and extent of Applicant's falsifications or warrants a finding that Applicant can presently be relied upon. The record indicates that Applicant was working for the same employer when she lied in her security clearance application and when she lied to DIS in July 1997. Since she told the truth only in September 1997 and only because she thought the truth would be revealed by a pending polygraph examination, it is impossible to escape the inference that, but for the pending polygraph examination, she would have continued to lie. There is nothing in the record refuting this conclusion. The intentional falsifications about her drug use concern clearly material matters and violate 18 U.S.C. 1001.

I find no mitigating factors as to either Criteria E (Personal Conduct) or J (Criminal Conduct). As to Criterion E, Applicant's falsifications were not "an isolated incident" and were "recent," and Applicant did not "subsequently provide correct information voluntarily" (MF 2). In addition, Applicant did not make "prompt, good-faith efforts to correct the falsification before being confronted with the facts" (MF 3). As to Criterion J, the last act of criminal behavior preceded the October 1997 issuance of the SOR by only three months (MF 1). The fact that Applicant lied twice and told the truth only under pressure indicates the criminal activity was not an "isolated incident," and there is no "clear evidence of successful rehabilitation" (MF (2) and (5)).

Having considered the evidence of record in light of the appropriate legal standards and factors, and having assessed the credibility of Applicant's written testimony, I conclude that the Government has established a *prima facie* case as to all SOR allegations (under Criterion H, E and J). I also find the existence of a nexus or connection between Applicant's unacceptable personal conduct and criminal conduct because the lies went directly to her security clearance eligibility.

I conclude that Applicant has adequately mitigated the Government's case as to her drug use (Criterion H), but that she has failed to carry her burden of persuasion as to her falsifications (Criteria E and J). Finally, I conclude that, at present, Applicant continues to lack the requisite good judgment, reliability, and trustworthiness required of someone seeking access to classified information. While Applicant claims that she is a "trustworthy person" and "will never do it [providing false information] again," (GX 3), not enough time has passed for the Government to have the level of confidence in her required of someone having access to the nations' secrets.

### **FORMAL FINDINGS**

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

CRITERION H (Drug Involvement) 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

CRITERION E (Personal Conduct) Against the Applicant

Subparagraph 2.a Against the Applicant

Subparagraph 2.b. Against the Applicant

CRITERION J (Criminal Conduct) 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. The SOR gives the date as 1994. The derivation of this date is not clear in the record evidence. GX 3, Applicant's sworn statement to DIS of September 17, 1997 contains a date that is not written clearly and could be either a 3 or another number. That would mean that the year of Applicant's single use of crystal methamphetamine would be either the 1994 date stated in the SOR, or a date other than 1994. In her response to the SOR (GX 3), Applicant admits the use of the illegal substance, but gives the date as 1991. Because of the unclear nature of the year given in GX 6, I accept Applicant's statement that the use occurred in 1991. The difference, in any case, is not dispositive.