

DATE: July 13, 2001

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 00-0721

**DECISION OF ADMINISTRATIVE JUDGE**

**JEROME H. SILBER**

**APPEARANCES**

**FOR GOVERNMENT**

Arthur A. Elkins, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Extensive and growing financial stake in Panama in comparison with the stake in the U.S. is unmitigated. Clearance is denied.

**STATEMENT OF THE CASE**

On February 12, 2001, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding 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 determine whether a clearance should be granted, continued, denied, or revoked. In a sworn written statement, dated March 23, 2001, the Applicant responded to the allegations set forth in the SOR and requested a hearing.

The undersigned Administrative Judge received the case assignment on May 14, 2001, and a notice of hearing was issued on June 4, 2001. The undersigned held a hearing on June 28, 2001. The Department Counsel presented six exhibits ("exhs") and no witnesses. The Applicant's case consisted of the presentation of four exhibits and his own testimony. The record in this case closed on June 28, 2001. The undersigned Administrative Judge received the transcript ("tr") of the hearing on July 6, 2001.

**FINDINGS OF FACT**

The Statement of Reasons (SOR) consisted of allegations predicated on the following two guidelines: paragraph 1, Guideline B (foreign influence), and paragraph 2, Guideline E (personal conduct). The undersigned Administrative Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following Findings of Fact:

The Applicant is a 48 year-old logistics consultant employed by a U.S. Government contractor since March 1997. The Applicant seeks to retain a Top Secret personnel security clearance.

The Applicant enlisted in the U.S. Army in 1974, received his warrant as a chief warrant officer in 1980, and was separated in March 1997, serving a total of 23 years--13 years of which were served in Panama. SOR answer. His performance evaluations since 1980 were consistently outstanding. Exh. A. During his Army career the Applicant was awarded the Legion of Merit, 3 meritorious service medals, 3 Army commendation medals, and an Army achievement medal. He also received the Commander's Award for Public Service for his performance in 2000. Exh. B. He is highly regarded by his friends and the joint task force he serves; he has the highest personal and professional standards and integrity. Exhs. C and D. In 1978 he married a Panamanian national, who was naturalized in 1995. He has three children, all U.S. citizens. Exhs. 1 and 2. His Panamanian parents-in-law are both deceased. SOR answer.

The Applicant has extensive financial interests in Panama as compared with his financial interests in the United States. He estimates that he now has \$70,000 invested in Panama. SOR answer. In tax year 2000, he had no Panamanian income and had about \$100,000 adjusted gross income from U.S.-sources--comprised of gross salary of \$75,000 and another \$26,000 in U.S. military retirement. Tr pages 74-77, 97-104, 119-121. He is realizing Panamanian-source income this year and expects that income to grow in future years. Tr page 73. He hopes to retire next year and expects to devote most of his attention to his Panamanian interests. Tr pages 36-37.

The Applicant is a part-owner, with his wife and a U.S.-Panamanian dual national, of a sport fishing business located on a few acres on the coast in Panama. Tr pages 78, 96-97. The Applicant also owns five acres on an undeveloped hill top about 10 miles from his lodge. The lodge includes guest rooms, and the business owns several fishing vessels. The business has no outside investors, bank loans, or liens. He has applied for a Panamanian license to conduct revenue-generating activity from his sport fishing business in Panama. Tr pages 61-63. He also owns two vehicles, six and 14 years of age, that are kept in Panama. Tr page 63. The Applicant invested about \$5,000--and remains a partner with two other U.S. citizens--in a classic 50-year-old, 36-foot fishing vessel that was restored in 1998 but is now inactive and too costly to maintain indefinitely. His wife inherited 1½ acres of Panamanian land worth about \$2,000, which has been cleared and planted with teak trees. Tr pages 64-65. The Applicant and his wife have \$3,000 to \$10,000 in a joint Panamanian bank account. He has no debts in Panama, other than normal operating costs and business fees which are paid promptly as required, and little debt in the United States. The Applicant and his wife plan to buy a residence in Panama, once the business grows to the point he must retire, in order to live there as well as in the United States. Tr page 77.

When the Applicant retired from the U.S. Army he was stationed in Panama and was required by the U.S. Unified Command there to apply for permanent residence in Panama in order to have, as a future military retiree, local exchange and commissary privileges and/or to be employed by the U.S. Government as a "local hire." The permanent residency was granted to him three years after he separated from the U.S. Army. Tr pages 66-68, 121-123; SOR answer. He is the unpaid secretary of a Panamanian company that is wholly-owned by a U.S. corporate parent: in order to compete for contracts awarded by the U.S. Government for work in Panama, the company must be registered in Panama. Tr pages 47-48; SOR answer.

During the 1980's the Applicant lent his first cousin \$7,000 to buy a 39-foot commercial fishing vessel. As collateral security for repayment, the Applicant demanded that the boat be registered in his name as the owner. As owner, the Applicant held the commercial fishing permits in his own name. The cousin operated the vessel as his business, but not very profitably. The Applicant did not receive any income from the commercial business and paid all his own Federal income tax obligations. The cousin was authorized to sign the Applicant's name as owner to various administrative papers that were necessary from time to time because the absentee Applicant was not located conveniently near his cousin and his vessel. <sup>(1)</sup> In March 2000 the Applicant sold the fishing vessel for \$25,000 and remitted the balance of the purchase price beyond the \$7,000 principal to his cousin in partial recovery of his cousin's operating expenses. SOR answer; tr pages 78-90, 93-94, 104-110.

## POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be

considered in evaluating an individual's security eligibility. The guidelines are divided into those that may be considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The guidelines, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

### **GUIDELINE B - FOREIGN INFLUENCE**

**A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.**

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

[8th] A substantial financial interest in a country, or in any foreign-owned or -operated business that could make the individual vulnerable to foreign influence.

**Conditions that could mitigate security concerns include:**

[5th] Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.

### **GUIDELINE E - PERSONAL CONDUCT**

**Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, 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:**

[4th] Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail;

[6th] Association with persons involved in criminal activity.

**Conditions that could mitigate security concerns include:**

[5th] The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress;

[7th] Association with persons involved in criminal activities has ceased.

The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section 6.3:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.

d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.

e. Absence or presence of rehabilitation.

f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

The nature, extent, and seriousness of the conduct

The circumstances surrounding the conduct, to include knowledge-able participation

The frequency and recency of the conduct

The individual's age and maturity at the time of the conduct

The voluntariness of participation

The presence or absence of rehabilitation and other pertinent behavioral changes

The motivation for the conduct

The potential for pressure, coercion, exploitation, or duress

The likelihood of continuation or recurrence

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security 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, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

"It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial [of a security clearance] by a preponderance of the evidence would inevitably shift the emphasis and involve the Board in second-guessing the agency's national security determinations."

*Dept. of the Navy v. Egan*, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go to the minimum *quantum* of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial evidence but something less than a preponderance of the evidence--rather than as an indication of the Court's tolerance for error below. [\(2\)](#)

The burden of going forward with the evidence then shifts to the applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the Government's case or through evidence of affirmative defenses. Assuming the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an applicant might deliberately or inadvertently fail to safeguard properly classified information, the applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless

eligible to hold a security clearance. <sup>(3)</sup>

## CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of those who testified, the undersigned concludes that the Government established its case with regard to Guideline B.

The Applicant has developed a major financial stake in Panama over the last few years as compared with the extent of his financial stake in the United States--his current salary and pension benefits. While none of the facts as alleged in SOR ¶ 1 (foreign influence), taken individually, <sup>(4)</sup> would persuade that he has become vulnerable to foreign influence to an extent that is security significant, the sum of those facts presents a case of an unacceptable security "risk"--that is, potential coercion, exploitation, or pressure from the Panamanian government. This falls within the scope of DC #8, rather than MC #5, which are identified on page 4 *supra*.

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of those who testified, the undersigned concludes that the Applicant successfully rebutted and overcame the Government's case with regard to Guideline E.

SOR ¶ 2 (personal conduct) alleges that the Applicant knowingly cooperated with and/or assisted his first cousin to evade U.S. income taxes on the latter's "profits" from his commercial fishing business by "allowing" him to keep the vessel in the Applicant's name. There is no evidence that the first cousin made a profit or that, if he did, the first cousin evaded U.S. income taxes. This was pure unreliable speculation on the part of the Applicant, offered in a vain attempt to "satisfy" a polygrapher. There is indeed a simpler and more convincing explanation for the vessel to have been titled to the Applicant: the one he testified to at the hearing. <sup>(5)</sup> In absence of persuasive factual evidence that the Applicant's first cousin was involved in criminal activity (evasion of income taxes) and that the Applicant conducted himself in a manner that could render himself susceptible to blackmail because of his first cousin's activity, DC #4, DC #6, MC #5, and MC #7, which are identified on page 5 *supra*, have little or no real pertinence to this case.

Each clearance decision is required to take into consideration pertinent factors set forth in Section 6.3 of the Directive and in the adjudicative process discussion at enclosure 2 to the Directive. These factors are identified on pages 5-6 *supra*. The foreign influence concern presented in this case is serious, taking into consideration all of the surrounding circumstances. The risks are current, and the Applicant believes his interests in Panama will only grow in future years. The present security concern will likewise grow.

## FORMAL FINDINGS

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item 25 of Enclosure 3 of the Directive are:

Paragraph 1. Guideline B: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Subparagraph 1.i.: Against Applicant

Subparagraph 1.j.: For Applicant

Subparagraph 1.k.: Against Applicant

Subparagraph 1.l.: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a.: For Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is the determination of the undersigned that it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

---

---

Jerome H. Silber

Administrative Judge

1. Because most of the commercial fishing industry is traditionally conducted on a cash basis, the Applicant believed that his cousin was likely not meeting his Federal income tax obligations. The Applicant did not know that as a certainty, but speculated to that effect during a three-day polygraph examination of the Applicant in an attempt to satisfy the polygrapher's purported concerns. Tr pages 37-39.

2. The rule has been restated as requiring "that security clearances should be revoked [*sic*] if doing so is consistent with the national interest;" *Doe v. Schachter*, 804 F. Supp. 53, 62 (N.D.Cal. 1992). *Cf.* with regard to the *quantum* of evidence the DOHA Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:

[Whether the] Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the [DOHA] Appeal Board shall give deference to the credibility determinations of the Administrative Judge.

Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. §556(d).

3. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 to the Directive).

4. SOR ¶ 1.j. alleges that the Applicant has permanent residency status in Panama, which he "received" during his U.S. military service there. The facts rebut that allegation inasmuch as the U.S. Command encouraged him to *apply* for such status during the last week he was on active duty. SOR ¶ 1.l. alleges that his parents-in-law are Panamanians living in Panama.

5. The Applicant also told the polygrapher that he had personally failed to disclose income to the IRS from charter fishing in Panama on weekends. Exh. 6, page 17. The Government's evidence does not substantiate that as a fact, and the Government refused to add such an allegation as an amendment to the SOR at the hearing. Tr pages 134-136.