

Date: June 27, 1997

In re:

SSN: -----

Applicant for Security Clearance

ISCR OSD Case No. 95-0329

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR THE GOVERNMENT

William S. Fields, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF THE CASE

On December 12, 1996, 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 February 12, 1997, the Applicant responded to the allegations set forth in the SOR and elected to have his case determined on the written record, in lieu of a hearing. A copy of the SOR is attached to this Decision and incorporated herein by reference.

The Applicant received a complete copy of the file of relevant material (FORM) on March 26, 1997. The Applicant also received an opportunity then to file objections and submit material in refutation, extenuation, or mitigation. The Applicant elected not to respond to the FORM within the requisite 30 days, *i.e.*, on or before April 25, 1997. The undersigned Administrative Judge received the case assignment on June 2, 1997.

FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following two criteria: paragraph 1, Criterion E (personal conduct); and paragraph 2, Criterion J (criminal conduct).⁽¹⁾ The Applicant has admitted the factual allegations contained in subparagraphs 1.a. and 1.b(2) of the SOR. Except as noted herein, the Applicant's admissions are hereby incorporated as findings of fact.

The undersigned Administrative Judge completely and thoroughly reviewed the evidence in the record, and upon due

consideration of the same, makes the following additional Findings of Fact:

The Applicant is a 40-year-old employee of a U.S. Government contractor. The Applicant seeks to obtain a Secret personnel security clearance.

A previous application for a Secret personnel security clearance was denied on February 9, 1994 (DISCR OSD Case No. 93-0627; FORM Item 7) in which an Administrative Judge found, *inter alia*, the following facts after holding a hearing:

1. The Applicant used marijuana from approximately 1973 to March 23, 1993, but that "he has abstained from the use of illegal marijuana and all other illegal drugs for approximately seven months prior to the hearing [October 14, 1993]." ⁽²⁾
The Applicant also snorted cocaine 4-5 times some time between 1973 and 1986. ⁽³⁾
2. The Applicant deliberately falsified his drug history on his National Agency Questionnaire (NAQ) on October 27, 1992, and on his signed, sworn statement to a Defense Investigative Service (DIS) agent on March 2, 1993. ⁽⁴⁾

The undersigned Administrative Judge finds that the Administrative Judge in the previous case had substantial evidence upon which to make those two findings of fact.

On April 5, 1995, the Applicant signed another NAQ stating that he had had a relapse and had used marijuana monthly between September 1992 and March 1993, but that he "had been clean since 930323." He also stated that his cannabis dependence was currently in remission and was being treated through a hospital substance abuse program that was scheduled to be completed that month (April 1995). On August 31, 1995, the Applicant signed a sworn statement for a DIS agent in which he stated: "[a]t this point, I can state, without any reservation or restriction, that I have not smoked any marijuana since 23 March 93."

On October 31, 1995, the Applicant signed another sworn statement for a different DIS agent in which he stated:

Initially during today's interview, I told [the DIS agent] that the last time that I smoked marijuana was in Mar 93 (23 Mar 93); however, later during today's interview, I informed [the DIS agent] that I quire possibly could have smoked marijuana with [name of an associate] at some point between 24 Mar 93 and Jul 93. I just don't recall any specific incident or occasion. I admitted to [the DIS agent] that I did smoke marijuana on either Christmas Eve or Christmas Day in Dec 93. I was at a small gathering at my brother-in-law's house in [city location]. I estimate that I smoked less than a half of a joint. I smoked the marijuana because others were smoking the marijuana and it was being passed around. This interview today is the first time that I have mentioned the fact that I smoked marijuana in Dec 93. I admit that I am an "addict" and this incident in Dec 93 was a true relapse. I admit that I was not truthful on my National Agency Questionnaire (NAQ) dated 05 April 95. I deliberately did not disclose during my DIS interview on 31 Aug 95 the fact that I smoked marijuana in Dec 93. I felt that if I mentioned that I used marijuana in Dec 93, then my clearance would be "history" (would not get my clearance) and that the Government could possibly "arrest me" for not telling the truth. I admit this was a deliberate falsification. In hindsight, I should have been honest on my NAQ, dated 05 Apr 95 and during my DIS interview on 31 Aug 95. I have not used marijuana on any other occasions and I certainly have not used any marijuana since Dec 93 in any quantity.

FORM Item 4, pages 2-3.

A so-called "certified results of interview" signed by a DIS agent on November 6, 1995, concerning an interview he had with the Applicant on November 3, 1995, has not been considered by this Administrative Judge because:

- (1) it does not appear that the Applicant had provided a knowing and intelligent waiver of his right to object to its admissibility pursuant to Item 20 of the additional procedural guidance attached to the Directive (encl. 3), ⁽⁵⁾ and
 - (2) the Department Counsel had not sought a hearing in this case at which the DIS agent could testify and be cross-examined by the Applicant on the substance of that document. ⁽⁶⁾

The DOHA Appeal Board has repeatedly alerted the Government to the impropriety of including ROIs in FORMs

with *pro se* applicants.⁽⁷⁾ More recently the Appeal Board has held that applicants do not waive their right to confront and cross-examine the Government's witnesses when they waive their right to a hearing and that the Government retains the right to request a hearing where an applicant does not--in order that the Government may put the testimony of a witness into evidence.⁽⁸⁾ The document itself (FORM Item 5) would in any case add little to the findings of fact made in this decision.

POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluation of 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 con-sidered as the most pertinent to the facts of this particular case.

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

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, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsi-bilities;

(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;

Conditions that could mitigate security concerns include:

None applicable.

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 crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

None applicable.

The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section F.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 knowledgeable 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 only draw 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. ⁽⁹⁾

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.⁽¹⁰⁾

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, the undersigned concludes that the Government established its case with regard to Criteria E and J.

The Applicant deliberately lied about his drug history on his NAQ on October 27, 1992, on his DIS statement on March 2, 1993, on his NAQ on April 5, 1995, and on his DIS statement on August 31, 1995. This personal conduct falls within DC #2 and DC #3, identified on page 5 *supra*. I can find no extenuation of or mitigation to this pattern of personal conduct. Therefore, SOR ¶1.a., SOR ¶1.c., and SOR ¶1.d. are found adversely to the Applicant. The Applicant did not, however, lie about his drug history on his DIS statement on October 31, 1995, as alleged in SOR ¶1.e.⁽¹¹⁾ See page 3 *supra*. Therefore, that SOR subparagraph is found favorably to the Applicant.

SOR ¶1.b. is confusing and awkward to this Administrative Judge. It is not clear that the Applicant really understood the allegations therein on February 12, 1997, when he admitted SOR ¶1.b(2) and denied SOR ¶1.b(1).⁽¹²⁾ All of the first paragraph of the SOR (including SOR ¶1.b.) cites Criterion E (personal conduct) rather than Criterion H (drug involvement). Criterion E does not comprehend the matters dealt with by Criterion H. Criterion E is not a "catch-all" category that can simply be utilized by the Government to pile on allegation upon allegation. Criterion E explicitly deals with such misconduct as deliberately lying to the Government in the course of a personnel security investigation or association with persons involved with criminal activity. Furthermore, even were Criterion H (drug involvement) included as a separate paragraph of the SOR, it would be found favorably to the Applicant. The Government's only evidence is that the Applicant used half of a marijuana cigarette about 3½ years ago! An applicant that has been diagnosed with cannabis dependency is not, *ipso facto*, ineligible for a personnel security clearance regardless of rehabilitative status or the probability that relapse will recur in the future. A 30-day treatment in a medical facility for such a condition is not, standing alone, a valid basis to deny that clearance. There is little evidence upon which to conclude that this Applicant is currently involved with illegal drugs, raising significant security concerns. His problem is his lying, not his use of pot. SOR ¶1.b. is therefore found favorably to the Applicant.

With regard to Criterion J, moreover, subparagraph 2.a. of the SOR charges that Applicant's falsifications constitutes criminal conduct (18 U.S.C. §1001).⁽¹³⁾ Conduct violative of that Act of Congress is a Federal felony. DC #1 and DC #2, identified on page 5 *supra*, are applicable. The undersigned concludes that the Applicant knowingly and willfully falsified, concealed or covered up his involvement with an illegal drug and therefore concludes SOR ¶2.a. adversely to the Applicant.

Each case decision is required to consider, as appropriate, the factors listed in Section F.3 and enclosure 2 to the Directive, identified on page 6 *supra*. The seriousness, frequency, and recency of the Applicant's deliberate falsifications suggest that this conduct will probably recur whenever he is confronted with a choice between telling the adverse truth under important circumstances involving his job, *etc.*, or securing an immediate, personal, or narrow advantage/relief through dissimulation.

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. Criterion E: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: For Applicant

Paragraph 2. Criterion J: AGAINST APPLICANT

Subparagraph 2.a.: Against 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. The SOR also contained a third paragraph of generalized allegations (denied) not attributable to a specific criterion. That paragraph is ignored by this Administrative Judge as mere surplusage in absence of citation to any criterion.
2. DISCR OSD Case No. 93-0627 (Feb. 9, 1994) at 3, 8, 9.
3. DISCR OSD Case No. 93-0627 (Feb. 9, 1994) at 3.
4. DISCR OSD Case No. 93-0627 (Feb. 9, 1994) at 2, 8.
5. A certified results of interview is little more than another name for the traditional report of investigation (ROI). *See* Executive Order 10865, § 5.
6. No hearing was requested by Department Counsel pursuant to Item 7 of the additional procedural guidance.
7. *See* DISCR OSD Case No. 91-0716 (Jan. 11, 1993) and DISCR OSD Case No. 91-1096 (Jan. 13, 1993).
8. DISCR OSD Case No. 93-0239 (Sept. 7, 1994), pages 4-5.
9. 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 DISCR 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 [DISCR] 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).

10. 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).

11. "e. During an interview with a Special Agent of the Defense investigative Service on October 31, 1995, you falsified material facts in that you stated you [*sic*] that your last use of marijuana occurred on March 23, 1995, whereas in truth and in fact, as you then and there well knew and sought to conceal, you had used marijuana more recently to at least December 1993."

12. "b. Criterion H: Improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information. Available information raising this concern shows that:

(1) You used marijuana, with varying frequency, at times daily from approximately 1973 to at least December 1993.

(2) You received treatment at the [name and location of facility] from March 21, 1995 to April 20, 1995, for a condition diagnosed as Cannabis Dependency."

13. The cited provision provides: "Whoever, in any matter within the jurisdiction of any department or agency of the United States **knowingly and willfully** falsifies, conceals or covers up by any trick, scheme, or device a material fact, or **makes any false, fictitious or fraudulent statements or representations**, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both." (emphasis added.) Such an offense is classified as a Class D felony in accordance with 18 U.S.C. §3559(a); with regard to the maximum fine authorized, *see* 18 U.S.C. §3571.