

Date: March 11, 1997

In re:

SSN: -----

Applicant for Security Clearance

DOHA Case No. 96-0558

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR THE GOVERNMENT

Matthew E. Malone, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF THE CASE

On August 8, 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,⁽¹⁾ and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked. On September 10, 1996, the Applicant elected to have his case determined on a written record in lieu of a hearing, and in a sworn written statement, dated October 18, 1996, the Applicant responded to the allegations set forth in the SOR. 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 December 12, 1996. 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-day period, i.e., by January 11, 1997. The undersigned Administrative Judge received the case assignment on January 28, 1997.

FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following two criteria: paragraph 1, Criterion H (drug involvement); paragraphs 2 and 3, Criterion E (personal conduct). The Applicant has admitted the factual allegations contained in each subparagraph of the SOR.⁽²⁾ Except as noted herein, the Applicant's admissions are hereby incorporated herein as findings of fact.

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

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

The Applicant is a 44-year-old man who has been employed by the same U.S. Government contractor since 1982. The Applicant seeks to retain a Secret personnel security clearance dating from July 5, 1984.

The Applicant is a long-time polysubstance abuser whose addiction has been diagnosed and treated by credentialed medical professionals. He sniffed glue for its intoxicating effects in the 1961-63 period at age 9 to age 11 and began to use marijuana and LSD in approximately 1967 when he was 15 years old. His use of heroin dates from 1970, his use of cocaine dates from 1976, and his use of Valium[®] and Percocet[®] that were not prescribed for him dates from 1976; this substance abuse continued off-and-on until January 1995. In addition, he used LSD in the 1967-73 period, PCP twice in 1975, amphetamines seven or eight times in about 1976, and methadone that was not prescribed for him in the 1976-78 period. He purchased various illegal drugs for his own use and sold relatively small quantities of them for profit. At times his illegal drug possession, use and sales occurred at his place of employment, and on occasion he reported to work under the influence of such drug use.

The Applicant's criminal record includes arrests for gambling (1968), attempted breaking and entering (1972), possession of a controlled dangerous substance (marijuana and hashish)(1973), theft from his employer to support his drug habit (1980), possession of marijuana (1981), possession of a controlled dangerous substance (Valium[®] and Percocet[®])(1985), attempting to purchase Valium[®] and Percocet[®] with a forged prescription (!986), and breaking and entering (1986). In 1994, he was also arrested for failing to remain at the scene of an automobile accident involving bodily injury. He had run a red light on that occasion because he was hurrying to withdraw money from a local credit union to buy drugs and "was afraid it was going to close before [he] could get there." FORM item 7, page 4.

The Applicant received medical treatment for drug abuse in April 1973 and in several facilities during the period April 28 through May 21, 1976. He most recently received inpatient medical treatment from January 3 through January 23, 1995, at Facility A for a condition diagnosed as "opioid" dependence and cocaine dependence. He continued thereafter to receive outpatient treatment at Facility B for more than a year, having successfully completed the program. The Applicant currently attends Narcotics Anonymous meetings four times a week and has been doing so since January 1995. He had been taken to Facility A by his supervisors when he reported for work to such a degree under the influence of crack, heroin, and Valium[®] that he "could hardly stand up." FORM item 7, page 6.

The Applicant has now been drug-free for the last two years and intends to remain so in the future. FORM item 7, page 7. All urine screens have been negative according to the employee assistance counselor of his employer; the counselor has continued to monitor the Applicant since January 1995. Attachment to the SOR answer, September 10, 1995. The Applicant has now remarried his ex-wife, and they attend church regularly; they visit nursing homes twice a week to help elderly residents. SOR answer, September 10, 1996.

On March 14, 1996, the Applicant gave a signed sworn statement to an agent of the Defense Investigative Service (DIS), in which the Applicant stated:

Breaking and Entering. I was never arrested or charged with breaking and entering. This is some sort of mix up. This may pertain to my son. . . .

Use at Work. I never used cocaine, crack, or heroin while at work or during my lunch hour . . . The only drugs I used at work were valium and percocet. I never kept any illegal drugs at work or had them on my person. . . .

Selling of Illegal Drugs. I never sold any illegal drugs. . . .

Denial of More Frequent Drug Use. I did not use \$50.00 worth of heroin and/or \$200.00 worth of cocaine both on a daily basis as [Facility A's] records stated. I also never used any drugs through using needles. If I made any such statement, it was only because my mind was so messed up for the drugs I had been using. . . .

FORM item 7, pages 4, 6-7. These statements were false, as the Applicant admitted in another DIS statement that was signed and sworn on June 11, 1996. FORM item 6.⁽³⁾

POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix I) 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 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.

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

CRITERION H - DRUG INVOLVEMENT

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.

Drugs are defined as mood and behavior altering:

- (a) drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens) and
- (b) inhalants and other similar substances.

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 (see above definition);
- (2) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;
- (3) failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. Current drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will normally result in an unfavorable determination.

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;
- (4) satisfactory completion of a drug treatment program prescribed by a credentialed medical professional.

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 responsibilities;

(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;

(5) a pattern of dishonesty or rule violations;

Conditions that could mitigate security concerns include:

(2) the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;

(3) the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts;

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. [\(4\)](#)

The burden of going forward with the evidence then shifts to the applicant for the purpose of establishing his 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 is nonetheless eligible to hold a security clearance. [\(5\)](#)

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 Criterion H.

The Applicant has a lengthy history of drug addiction and involvement in illegal drug sales and purchases that make the DCs, identified on page 5 *supra*, applicable to his case. Although his drug abuse was fairly recent, lengthy, and frequent, he has demonstrated an intent not to abuse any drugs in the future and has successfully completed a drug treatment program prescribed by a credentialed medical professional. Thus, two MCs, identified on page 5 *supra*, are also applicable to his case. However, this Administrative Judge is concerned that there has not been sufficient time in which he has been drug-free to rebut the Government's case. In light of his involvement in illegal drug purchases and sales for profit and related criminal activities, as well as repeated addiction diagnoses during several drug rehabilitation efforts, four or five years of a drug-free lifestyle would be necessary to rebut the Government's case under these facts.

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 Criterion E.

The recent falsification of the Applicant's DIS statement compounds his falsification of his 1981 Personnel Security Questionnaire. Such falsification is neither in the distant past nor isolated. Moreover, there is no evidence that the Applicant made prompt, good-faith efforts to correct the falsification voluntarily before being confronted with the facts. He has also demonstrated a pattern of "rule violations," such as criminal gambling and leaving the scene of an accident under the circumstances described. Moreover, the Applicant's falsifications constitute felonious conduct under 18 USC §1001. None of the MCs applicable to Criterion E are unqualifiedly applicable to the facts of this case.

Each personnel security clearance decision must consider the appropriate factors enumerated in Section F.3 and enclosure 2 of the Directive, identified on pages 6-7 *supra*. There is evidence of rehabilitation to some degree, but there is more than a mere possibility of a prolonged relapse - based on previous relapses - that continues to concern this Administrative Judge.

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 H: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: For 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.: Against Applicant

Subparagraph 1.k.: Against Applicant

Subparagraph 1.l.: Against Applicant

Subparagraph 1.m.: Against Applicant

Subparagraph 1.n.: Against Applicant

Subparagraph 1.o.: Against Applicant

Subparagraph 1.p.: Against Applicant

Subparagraph 1.q.: Against Applicant

Subparagraph 1.r.: Against Applicant

Subparagraph 1.s.: Against Applicant

Subparagraph 1.t.: Against Applicant

Subparagraph 1.u.: Against Applicant

Subparagraph 1.v.: Against Applicant

Subparagraph 1.w.: Against Applicant

Subparagraph 1.x.: Against Applicant

Subparagraph 1.y.: Against Applicant

Subparagraph 1.z.: Against Applicant

Subparagraph 1.aa.: Against Applicant

Subparagraph 1.bb.: Against Applicant

Subparagraph 1.cc.: Against Applicant

Subparagraph 1.dd.: Against Applicant

Subparagraph 1.ee.: Against Applicant

Subparagraph 1.ff.: Against Applicant

Subparagraph 1.gg.: Against Applicant

Subparagraph 1.hh.: Against Applicant

Subparagraph 1.ii.: Against Applicant

Subparagraph 1.jj.: Against Applicant

Subparagraph 1.kk.: Against Applicant

Subparagraph 1.ll.: Against Applicant

Subparagraph 1.mm.: Against Applicant

Subparagraph 1.nn.: Against Applicant

Subparagraph 1.oo.: Against Applicant

Subparagraph 1.pp.: Against Applicant

Subparagraph 1.qq.: Against Applicant

Paragraph 2. Criterion E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Paragraph 3. Criterion E: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against Applicant

Subparagraph 3.c.: Against Applicant

Subparagraph 3.d.: Against Applicant

Subparagraph 3.e.: 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 Applicant's name is the same as the name of -----.
2. There is **no** evidence, corroborated or uncorroborated, whatsoever **provided to the Applicant** (other than the bare admission **provided by the Applicant**) to substantiate the SOR subparagraph 1.c. allegations. Although item 14 of the Additional Procedural Guidance (Enclosure 3 to the Directive) imposes on Department Counsel the responsibility for presenting evidence to establish controverted facts (see footnote 5 on page 8 *infra*), item 7 imposes the **further mandatory** responsibility in non-hearing cases, such as the instant case, on the Department Counsel of "providing the applicant with a copy of all relevant and material information that could be adduced at a hearing." The absence of such evidence regarding SOR subparagraph 1.c. in the FORM compels the conclusion that no such evidence is in the possession of Department Counsel.
3. The Applicant also falsified a Personnel Security Questionnaire (DD Form 48) that he signed on August 20, 1981, in which he answered negatively to the question: "Are you now or have you ever been addicted to the use of habit forming drugs such as narcotics or barbiturates?" FORM item 23. On May 11, 1976, the Applicant had been diagnosed by a medical doctor as suffering from drug dependence for heroin, marijuana, and other psycho-stimulants. FORM item 11. The Applicant had also been convicted of theft from his employer on January 31, 1981, in connection with his stealing to support his drug habits. FORM item 8, page 3; FORM item 16, page 4.
4. 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).
5. 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).