

Date: June 6, 1997

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 96-0606

**DECISION OF ADMINISTRATIVE JUDGE**

**JEROME H. SILBER**

**APPEARANCES**

**FOR THE GOVERNMENT**

Earl C. Hill, Jr., Esq.

Department Counsel

**FOR THE APPLICANT**

*Pro se*

**STATEMENT OF THE CASE**

On August 28, 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 written statement, sworn on October 15, 1996, the Applicant responded to the allegations set forth in the SOR and elected to have her case determined on a 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 19, 1997. The FORM, dated December 31, 1996, consisted of six items and a three-page transmittal memorandum. The Applicant also received an opportunity then to file objections and submit material in refutation, extenuation, or mitigation. The Applicant's response to the FORM was received by DOHA on April 4, 1997. The response consisted of five pages and a transmittal letter. The under-signed Administrative Judge received the case assignment on April 23, 1997.

**FINDINGS OF FACT**

The Statement of Reasons (SOR) consisted of allegations predicated on the following three criteria: paragraph 1, Criterion H (drug involvement); paragraph 2, Criterion E (personal conduct); paragraph 3, Criterion J (criminal conduct). The Applicant has admitted the factual allegations contained in each of the subparagraphs of the SOR except subparagraphs 1.b., 1.c., and 1.f. of the SOR. <sup>(1)</sup> She did not, however, respond to paragraph 3 of the SOR; that

paragraph is, therefore, deemed to have been denied. 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 55-year-old ----- employed by a U.S. Government contractor since September 1982. The Applicant seeks to retain a Secret personnel security clearance originally granted her on January 10, 1983.

The Applicant was born in 1941, was married when she was 17 years old, had a daughter and a son, entered the job market when she was about 30 years old, was divorced in 1974 after about 15 years of marriage, and married her present husband eight years later in 1982. She has a stepson now in his 30's. She received an associate degree in management in 1990 and was graduated with a bachelor's degree in computer information systems in 1992. She has since received very good job performance appraisals and has twice been named the employee-of-the-month. On February 13, 1995, the Applicant gave a signed, sworn statement to an agent of the Defense Investigative Service (DIS). The statement disclosed the following information:

- She smoked marijuana at neighborhood pool parties in the 1970's. There is no evidence that she ever used marijuana twice a week as alleged. She and her husband have not used marijuana since 1982, with the exception that she had on rare occasions taken a puff of her daughter's marijuana cigarette when visiting her daughter in the latter's home out-of-state every year or so. [The SOR answer of October 15, 1996, notes that the Applicant last smoked marijuana in December 1994 when visiting her daughter, notwithstanding the SOR allegation that she used marijuana to at least February 1995.]
- In the 1970's she tried cocaine and speed of some sort, but didn't like either. There is no evidence that she ever used cocaine weekly as alleged. [The SOR answer of October 15, 1996, notes that the Applicant once tried ½ a Quaalude, but that she has not "done any other kinds of drugs, other than prescribed, since the 1970s."
- The Applicant never directly bought illegal drugs from a dealer and only rarely contributed to someone else's purchase.
- She believes that "smoking pot is not as dangerous as drinking [alcohol]" and that "[i]f it were legalized, . . . it could become a more serious problem only because it would be more accessible."
- Her lifestyle never interfered with her work habits; she has always been a very conscientious employee.

However, she denied ever using or being involved in the illegal purchase of marijuana, cocaine, depressants, or stimulants when she signed a Personnel Security Questionnaire (PSQ), DD Form 48, on July 19, 1989, and again when she signed different Personnel Security Questionnaire (PSQ), DD Form 398, on July 13, 1994. Each form contains a printed advisement that knowing and willful false statement can be punished under title 18 United States Code, §1001.

### 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 considered 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 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) . . . 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;

**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;

**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.<sup>(2)</sup>

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, the undersigned concludes that the Applicant successfully rebutted and overcame the Government's case with regard to Criterion H.

Based strictly on the evidence contained in the FORM and the Applicant's response and the unavailability of testimonial evidence at a hearing, the Applicant was very minimally involved with illegal drugs, mostly marijuana, in the distant past, even less frequently involved in the last 10-15 years, has abstained from any illegal drug activity for nearly 2½ years now, and has not expressed any intent to refuse to quit such use. Consequently, DC #1 and DC #2, but not DC #3, identified on page 4 *supra*, are applicable to her case. On the other hand, MC #1, MC #2, and MC #3, identified on pages 4-5 *supra*, are also applicable. Her distaste for illegal drug activities<sup>(4)</sup> and her abstention from all marijuana use for over two years, demonstrates an "intent not to abuse any drugs in the future." Criterion H is concluded favorably to the Applicant.

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 evidence is undisputed that the Applicant falsified her PSQs in 1989 and 1994 by concealing from the Federal Government her drug involvement, a material fact relevant to its security clearance investigations. However, this conduct is only of security concern if it was "deliberate" according to DC #2, identified on page 5 *supra*. The Applicant stated on her February 13, 1995 DIS statement:

On my previous questionnaire, I answered the question as though it meant did I presently use a controlled substance, therefore, I must have missed the total intent of the question.

This analysis is a possible, but implausible, explanation of both falsifications. In her October 15, 1996 answer to the SOR, which she termed a "confession," she stated:

I cannot deny the severity of my offenses of not being up front in the very beginning about my excesses in the past. And, there is no excuse for my continuing in my transgressions, but even honorable men can make mistakes.

This passage is candid, but it is, more importantly, reasonably suggestive of her "knowledge" that she was not being "up front" at the time she signed the PSQs. In absence of evidence of coercion, bad advice from authorized personnel, or good faith efforts on her part to correct voluntarily the information on the PSQs before being confronted with the facts, there is little lawful basis to extenuate or mitigate the falsification. She has, indeed, given no rebutting information, but simply a plea "for another chance." The falsifications were deliberate, and the offenses, severe under title 18 United States Code, §1001.<sup>(5)</sup>

The Directive requires that the factors listed in Section F.3 and enclosure 2 to the Directive, identified on page 6 *supra*, be considered, as appropriate, in making this decision. The nature, seriousness, repetition, and recency of the Applicant's falsifications all militate against the Applicant as does her age. There is, however, in the opinion of this Administrative Judge, little likelihood of a continuation or recurrence of deceptive practices *vis-a-vis* the Federal Government or potential for pressure, coercion, exploitation, or duress. The Applicant made a mistake and has offered little basis to excuse it, other than sympathy for her plight. Criteria E and J are concluded unfavorably to the Applicant.

## 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: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Paragraph 2. Criterion E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: For Applicant

Paragraph 3. Criterion J: AGAINST APPLICANT

Subparagraph 3.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.

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Jerome H. Silber

Administrative Judge

1. 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 2.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 3** 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 2.c. in the FORM compels the conclusion that no such evidence is in the possession of Department Counsel.

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 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).

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. The Applicant notes that smoking marijuana hurts her throat (DIS statement, February 13, 1995).

5. 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.