

Date: July 10, 1997

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0685

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR THE GOVERNMENT

Pamela C. Benson, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF THE CASE

On September 23, 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 October 16, 1996, the Applicant responded to the allegations set forth in the SOR and chose to have his 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 January 3, 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 within the requisite 30 days, *i.e.*, on or before February 2, 1997, when the record of the case closed. The case was assigned to Administrative Judge Mason on April 22, 1997, and transferred to the undersigned Administrative Judge for caseload balancing reasons on July 8, 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); and paragraph 3, Criterion J (criminal conduct). The Applicant has admitted the factual allegations contained in subparagraph 1.a. of the SOR. (u) Except as noted herein, the Applicant's admission is hereby incorporated as a finding 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 39-year-old employee of a U.S. Government contractor, which has employ-ed him since October 2, 1995. The Applicant seeks to obtain a personnel security clearance.

The Applicant used marijuana monthly on average from about 1973, while in high school, until he was 25 years old in about 1983. His marijuana purchases were strictly for personal use only. He also used LSD once in high school in about 1976 and continued to use LSD infrequently until he was 25 years old in about 1983.

The Applicant used cocaine from about 1990 until about 1993. On August 15, 1993, the Applicant tested positive for cocaine on a urinalysis.⁽²⁾ After abstinence from all illegal drug involvement for 2½ years, he had a one-time relapse in February 1996 and snorted a line of cocaine. He regretted that action almost immediately and has since remained completely illegal drug-free. He intends to continue to remain completely drug-free.

On November 15, 1995, the Applicant deliberately falsified his security clearance application (DD 398-2 test) by denying that he had ever tried or used or purchased any illegal drugs. On April 10, 1996, he signed a sworn statement for a Defense Investigative Service (DIS) agent that acknow-ledged his marijuana use (but only in about 1973 to 1976), one-time only use of LSD while in high school, and cocaine use (but only three or four times in 1993, resulting in a positive urinalysis test for that substance). The Applicant admits to "withholding this information" because he felt that his job would be in jeopardy if he disclosed it.

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).

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, process-ing, 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;
- (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. ⁽³⁾

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. ⁽⁴⁾

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.

The Applicant purchased and abused illegal drugs for about ten years in his youth. This falls within the scope of DC #1 and DC #2, identified on page 4 *supra*. There is no evidence that the relapse on one occasion in February 1996, while occurring after he applied for a personnel security clearance, was done in defiance of governmental and corporate drug-free policies nor that such drug use is "current" within the scope of DC #3, also identified on page 4 *supra*. Indeed, there is substantial evidence that the pattern of his drug involvement to 1993 was not recent, that his LSD use was infrequent, and that he has demonstrated an intent not to abuse any drugs in the future. See MC #1, MC #2, and MC #3 *supra*. This evidence rebuts the concern that drug involvement is of current security significance, particularly his prompt remorse in February 1996. SOR ¶1 (Criterion H) is found 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 Applicant deliberately falsified his security clearance application and his sworn statement signed on April 10, 1996, concealing his full involvement with illegal drugs. This conduct was recent, repeated, and occurred within two months after the cocaine relapse incident in February 1996. Had he volunteered to correct his security clearance application in his interview with the DIS agent--especially after he acknowledged that he had a positive urinalysis test for cocaine in August 1993--the falsification issue might be viewed in a more favorable light. As it is, the evidence of record shows little evidence of mitigation or extenuation for such lying to the Government. With regard to Criterion J, moreover, subparagraph 3.a. of the SOR charges that Applicant's falsifications constitute criminal conduct (18 U.S.C. §1001).⁽⁵⁾ 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 illegal drugs (a material fact) and therefore concludes SOR ¶2 (except ¶2.c.) and SOR ¶3.a. adversely to the Applicant.

This Administrative Judge has considered the factors identified in Section F.3 of the Directive and those in enclosure 2 thereto. See page 6 *supra*. The Applicant's drug activity was marked by the Applicant's relative youth and emotional immaturity at the time. There is little likelihood of a recurrence of illegal drug activity, but there is no confidence that the Applicant would refuse to lie in a situation in which the truth could foreseeably have adverse consequences for him personally. Had his dishonesty been confined simply to concealment in the distant past, it would certainly have been mitigated by now. Instead, he lied within the last year--and lied to the Government in a personnel security investigation.

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

Paragraph 2. Criterion E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: Against 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.

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 4 on page 7 *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 evidence and allegations in SOR ¶ 1.b. concerning the background preceding the urinalysis and the non-drug-related consequences that ensued from that positive test are ignored by this Administrative Judge as irrelevant to the criterion on which SOR ¶ 1 is predicated. Other derogatory financial information in the FORM is likewise ignored as irrelevant to the SOR allegations.

3. 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).

4. 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).

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.