

Date: April 30, 1997

In re:

SSN: -----

Applicant for Security Clearance

ISCR OSD Case No. 96-0733

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 November 25, 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⁽¹⁾ 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. A copy of the SOR is attached to this Decision and incorporated herein by reference.

In a sworn written statement, dated December 18, 1996, the Applicant responded to the allegations set forth in the SOR and elected to have his case determined on a written record, in lieu of a hearing. The Applicant's SOR answer was received by DOHA on December 23, 1996; on December 30, 1996, the Department Counsel nevertheless requested a hearing pursuant to item 7 of the additional procedural guidance (encl. 3 to the Directive). *See* the transcript ("Tr") of the hearing at pages 15-16.

The undersigned Administrative Judge received the case assignment on January 8, 1997. The undersigned held a hearing on March 12, 1997. The Department Counsel presented six exhibits ("Exhs") and the testimony of two witnesses. The Applicant presented no exhibits and no witnesses besides his own testimony. The undersigned Administrative Judge received the transcript ("Tr") of the hearing on March 25, 1997.

RULINGS ON PROCEDURE

At the hearing the SOR was amended in ¶2.b. to insert the word "and" immediately after "UCMJ" so that it reads ". . . whereas in truth and in fact as you then and there well knew and sought to conceal you had been arrested, charged

and/or received non-judicial punishment under Article 15 of the UCMJ and as set forth in subparagraphs 1.a. and 1.d., above." The Applicant was aware when he prepared his SOR answer before the hearing that this portion of the SOR was intended to make the allegation as amended. Tr pages 114-115, 119-130.

FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following two criteria: paragraph 1, Criterion J (criminal conduct); and paragraph 2, Criterion E (personal conduct). The Applicant has admitted the factual allegations contained in subparagraphs 1.a. and 1.d. 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 33-year-old ----- employed by a U.S. Government contractor. The Applicant seeks to obtain a Secret personnel security clearance.

When the Applicant was 20 years old, he was given a bicycle worth about \$600 by a bicycle shop for a test ride, surrendering his wallet as security. He was arrested 1½ years later when he was recognized by the shopowner, the police were called, and the Applicant was arrested on a misde-meanor theft charge on June 13, 1986. He returned the bicycle, paid \$85 in court costs, was placed in a pre-indictment program, and was put on unsupervised probation for a year. The charge was dropped on August 30, 1988.

The Applicant worked as a clerk in a local supermarket part-time from January 1984 to February 1989 and as a full-time employee from April 1992 to March 1995. He was fired in March 1995 for stealing food to eat during a break. He cashed an unemployment check for \$590 at the supermarket shortly after being fired on or about March 14, 1995. He had stolen the check from a "community mail box" and had forged the payee's endorsement on it. Within a month thereafter he moved out of state. Warrants for his arrest on charges of receiving stolen property (misdemeanor) and forgery (felony) were issued in July 1995, and another warrant was issued for failure to appear at arraignment in August 1995. The Applicant was arrested on a fugitive warrant on June 24, 1996, for extradition; the demand for extradition was dismissed on July 12, 1996, based upon his promise to return to face the charges. On July 29, 1996, he pleaded guilty to receiving stolen property and forgery. He was sentenced to probation for a year and required to pay \$590 in restitution and \$232 in fines and court costs. His probation period will end in July 1997. Tr pages 147, 165-167.

On August 10, 1995, he signed a National Agency Questionnaire (NAQ) on DD Form 398-2 in connection with an application for a personnel security clearance. On the NAQ he deliberately failed to list his employment with the supermarket during 1992-95⁽²⁾ and failed to list either his 1986 arrest or a non-judicial punishment he had received in 1981 while in military service. Tr pages 136-145. He had not been arrested at the time (August 10, 1995) on the charges of receiving stolen property (misdemeanor) and forgery (felony).

While the Applicant was working full-time at the supermarket, he rented an unfurnished room in a local rooming house in the spring of 1993. He terminated his month-to-month tenancy-at-will in the fall of 1994, still owing \$300 in unpaid rent to the landlady.⁽³⁾ Tr pages 47, 68, 78, 94-95, 108, 112. He moved when the landlady was not present. He directed (or allowed) the movers to take with his own belongings a number of items that belonged to the landlady. When called on it shortly thereafter, the Applicant personally returned some of the items, including an ----- vacuum cleaner, a ----- --,™ a small 2' tall figurine or statue, a small refrigerator, and a brass tray for calling cards. Other items that had been taken were not, however, returned to the landlady, including \$40 bookends, two \$36 fancy candles, two pillow shams, and a \$75 toolbox that had belonged to the landlady's late husband with his tools in it. The Applicant told the landlady that the movers must have kept those unreturned items. Most of the items taken had not been in the Applicant's rented room where the movers should have been but had been in the basement where he stored his bicycles and in other common areas of the rooming house.

The Applicant moved to an unfurnished apartment about 10 miles away where he resided until he left the state in March 1995. The landlord of the apartment claims he took about \$500 worth of furnishings not belonging to the Applicant, and

the latter declares that the claim is simply an invention to excuse the landlord's confiscation of the \$500 security deposit. In absence of corroborating evidence, no finding of fact is made on this issue. Tr pages 158-161.

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 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;

Conditions that could mitigate security concerns include:

None applicable.

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:

(1) reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances;

(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;

(5) a pattern of dishonesty or rule violations (to include violation of any written or recorded agreement made between the individual and the agency);

Conditions that could mitigate security concerns include:

(1) the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;

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 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.⁽⁵⁾

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 Criterion J.

The evidence is clear that the Applicant has engaged in a pattern of criminal conduct involving theft and dishonest actions over an extended period of time, that those actions were voluntary, and that they were neither in the distant past nor isolated. He remains on probation out-of-state. The Applicant paid his rent to his landlady in cash based on an oral lease, declined her offer to give him monthly receipts for his rent payments, and then responded to the SOR on December 18, 1996:

I did not owe any unpaid rent. Paying rent was an undocumented event with no form of record keeping on the part of landlord [*sic*]...

The Applicant did not offer any records that he had made of the payment of rent at the hearing and disputed the landlady's testimony as to the amount of the monthly rent. On the whole the landlady's testimony on these points is entirely credible.

With further regard to Criterion J SOR ¶ 1.e. charges that the Applicant's falsifications of his NAQ of August 10, 1995, constitutes criminal conduct (18 U.S.C. §1001). Conduct violative of that Act of Congress is a Federal felony.⁽⁶⁾

The undersigned concludes that the Applicant did knowingly and willfully falsify, conceal or cover up his complete employment and arrest history and therefore concludes SOR ¶1.e. adversely to the Applicant.

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 Criterion E.

Here again, the Applicant deliberately concealed information on his signed NAQ that would lead government investigators to sources of pertinent adverse information. He did not just "forget." The allegations concerning the violation of his former landlady's trust and, specifically, her property was substantiated by her testimony, whereas the dispute with his landlord arising from his departure in March 1995 is unsubstantiated. The Applicant make no prompt, good faith effort to correct the NAQ falsification until confronted with evidence of his 1986 arrest in August 1996-- although he then volunteered information concerning his June 1996 arrest and his employment with (and discharge from) the supermarket in March 1995.

The Directive requires that the factors listed in Section F.3 and enclosure 2 to the Directive, identified on pages 5-6 *supra*, be considered, as appropriate, in making this decision. The nature, seriousness, frequency, and recency of the Applicant's criminal conduct and falsification all militate against the Applicant as does his age. There is no evidence of rehabilitation from the pattern of petty theft and evasion of the truth. His sentence for felonious forgery is as well-deserved as it is light.

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 J: 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

Paragraph 2. Criterion E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: 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. Exhibit 6 (FBI Identification record) identifies the Applicant's middle name as "-----."
2. The general instructions for completing the DD Form 398-2 specify that an applicant must identify all employment(s) and period(s) of unemployment with the prior five years. Therefore, the Applicant was not required to list his part-time employment at the supermarket in 1984-89.
3. The landlady had asked the Applicant to find other accommodations a few months before he left because she was trying to change from a rooming house for long-term tenants to a bed-and-breakfast for short-term tenants.. Tr pages 43-45.
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).
6. 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.