

Date: March 31, 1997

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0775

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR THE GOVERNMENT

Matthew E. Malone, Esq.

Department Counsel

FOR THE APPLICANT

Daniel S. Alcorn, Esq.

STATEMENT OF THE CASE

On October 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 sworn written statement, dated November 15, 1996, the Applicant responded to the allegations set forth in the SOR and requested a hearing. A copy of the SOR is attached to this Decision and incorporated herein by reference.

On December 23, 1996, the case was assigned to Administrative Judge Braeman, who mailed a notice of hearing on January 14, 1997. The undersigned Administrative Judge received the case re-assignment on February 3, 1997, for caseload reasons. The undersigned held a hearing on February 6, 1997. The Department Counsel presented three exhibits ("Exhs") and the testimony of two witnesses. The Applicant's case consisted of the presentation of two exhibits and the testimony of two witnesses besides his own. The undersigned Administrative Judge received the transcript ("Tr") of the hearings on February 18, 1997. The transcript was amended on March 3, 1997, at the Applicant's request without objection by the Department Counsel.

RULINGS ON PROCEDURE

Exhibit 2, information concerning a denial of a clearance for the Applicant for access to sensitive compartmented information (SCI) that had been obtained by the Defense Investigative Service (DIS), was proffered by the Government at the hearing and was admitted into evidence over the objection of the Applicant. Tr pages 17-35, 66-77, 164-167.

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 each of the subparagraphs of the SOR -- except subparagraph 1.c. (cocaine use) which subparagraph he denied. 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 the same, makes the following additional Findings of Fact:

The Applicant is a 26 year-old ----- employed for the last 2¾ years by ----- company, a U.S. Government contractor. According to a proffer by the Department Coun-sel, the Applicant seeks to obtain a Top Secret personnel security clearance. Tr page 202.

The Applicant transferred from one high school to another after his freshman year (circa 1985) because he did not want to be associated with fellow students who used drugs. However, he began experimental use of marijuana in his junior year (circa 1987) at the new school. Tr page 139. He began associating with a two-year-older friend, a friend whom he and his family had known since the Applicant's early childhood, during his second semester freshman year at college (circa January 1989). Tr page 140. The Applicant discovered that his friend was involved with the purchase, finance, trafficking across state lines, and sale for profit of illegal drugs, *i.e.*, cocaine and marijuana. The Applicant assisted his friend in each of these kinds of illegal drug operations over the course of the next fourteen months.⁽¹⁾ The Applicant used marijuana infrequently during his college years⁽²⁾ as well as in the period after he graduated in 1992 until April 1995.⁽³⁾ Tr pages 104, 133. At the end of 1995, marijuana was used in his presence at his residence. Having been informed by a Federal government investigator that it was unwise to allow such use in his presence, the Applicant forbid it after February 1996. Tr pages 117-119, 158-159. The Applicant has no intention to use illegal drugs or engage in trafficking or distribution of illegal drugs in the future. Tr pages 146-147.

The Applicant's childhood friend was arrested in the middle of 1989. The Applicant's parents had long known the friend's parents, knew the Applicant idolized his friend, and learned of the friend's arrest. The Applicant's parents suspected that he was involved with the friend's drug-dealing and questioned the Applicant closely and repeatedly about such suspected involvement. The Applicant claimed that he was not involved. At the conclusion of one grueling and emotional session that lasted 3-4 hours after one o'clock in the morning, the Applicant's father collapsed from what was then thought to have been a minor stroke. The Applicant felt guilty about his role in precipitating his father's collapse. During October 1989 he was told by his father that the latter had been diagnosed with a brain tumor that required surgery. At that point, the Applicant silently swore to himself that he would never again be involved with drug-dealing if his father's surgery was successful. His father survived, and the Applicant terminated his drug-dealing activities (but not his marijuana use).⁽⁴⁾ Tr pages 142-145.

The Applicant falsely denied any marijuana use as well as his other activities involving illegal drugs on a Personnel Security Questionnaire (PSQ) he signed on April 27, 1995, as well as denying them to a DIS agent in an interview conducted in September of that year, for fear that his father would learn of it because of his position as --- and ----- - of the Applicant's employing firm. Exhibit 1, page 4; tr pages 40-45, 90-92. The Applicant's parents have to this day never been told about his illegal drug history. Tr pages 153-158, 196-202.

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 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 C). 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;

Conditions that could mitigate security concerns include:

- (1) the drug involvement was not recent;
- (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;
- (4) personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or pressure;
- (5) a pattern of dishonesty or rule violations (to include violation of any written or recorded agreement made between the individual and the agency);
- (6) association with persons involved in criminal activity.

Conditions that could mitigate security concerns include:

(7) association with persons involved in criminal activities has ceased.

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 pertinent.

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. [\(5\)](#)

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. [\(6\)](#)

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

There is clear evidence that the Applicant purchased, sold, distributed, financed, and trafficked in illegal drugs as well as used marijuana. His involvement was neither brief nor casual. On the other hand it was mitigated because the use last occurred almost two years ago, the other drug activities occurred in the distant past, and his intentions to stay clear of any further involvement with illegal drugs are clear. SOR ¶1 is concluded favorably 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 Criteria E and J.

The Applicant's deliberate falsification in 1995 concerning his illegal drug history is admitted and proven by the evidence in the record. It was a culmination of a pattern of dishonesty toward his parents that still continues, leaving him vulnerable to coercion. The recency of his repeated lying to the Federal Government concerning his application for a personnel security clearance is notable. While the Applicant's motivation in denying his drug involvement to his father initially contained a measure of extenuation, the perpetuation over the years since of such dishonesty, drawing on the same excuse, counts against his security clearance eligibility. The current cessation of his association with the "drug scene" and the criminal activities necessarily implicated therein is considered somewhat mitigatory of the charges fairly laid against him. The deliberate falsification in the Applicant's PSQ and in his DIS interview 1½ years ago constitute Federal felony counts under 18 USC §1001. SOR ¶2 and ¶3 are concluded 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 pages 6-7 *supra*. The Applicant appears to have a bright future because of his diligence and ambition. His complicity with his childhood friend's drug activity was marked by the Applicant's 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 from his parents in the circumstances prevailing in 1989, it would certainly have been mitigated by now. Instead, he continued to lie -- and lie 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.: For Against Applicant

Subparagraph 2.b.: For Against Applicant

Subparagraph 2.c.: For 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. Exhibit 3, page 2.
2. He also is charged with "cocaine" use during his college years. In fact, he once tested a substance to discover whether it was cocaine by placing a bit of it on his tongue. Because it did not produce a numbing effect, he concluded that the substance was not cocaine. Tr pages 134-135. There is no positive evidence that it was cocaine, despite his intentions.
3. The Applicant's last marijuana use roughly coincided with the time his PSQ was falsified. Exhibit 1; tr page 230.
4. The Applicant's statement to DIS (exhibit 3, page 2) indicates that the Applicant "involvement" ceased in the spring of 1990, but his testimony at the hearing suggests that this may have occurred in the autumn of 1989. Tr pages 144-145.
5. 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).

6. 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).