

Date: April 10, 1997

In re:

SSN: -----

Applicant for Security Clearance

ISCR OSD Case No. 96-0790

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 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 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 January 3, 1997, 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.

The undersigned Administrative Judge received the case assignment on January 27, 1997, and held a hearing on February 19, 1997. The Department Counsel presented three exhibits ("Exhs"), but did not call any witnesses. The Applicant's case consisted of five exhibits and the testimony of one witness in addition to his own. The Applicant's exhibit E was received before February 26, 1997, *i.e.*, within the time limit set at the hearing. The undersigned Administrative Judge received the transcript ("Tr") of the hearing on March 4, 1997.

RULINGS ON PROCEDURE

Exhibit 1 was presented by the Government and admitted into evidence without objection. Tr pages 19-20. Exhibit 1 is an unsigned, typewritten excerpt from Form 86, Questionnaire for National Security Positions. The decision, however, does not rely upon this exhibit because the exhibit is neither complete nor does it bear a signature or date.

FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on one criterion: paragraph 1, Criterion G (alcohol consumption). The Applicant has admitted the factual allegations contained in each subparagraph 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 since 1987 by a U.S. Government contractor. The Applicant seeks to retain a Secret personnel security clearance.

The Applicant began drinking alcohol to excess in his teens. He has a pattern of binge drinking interspersed with periods of sobriety. He has at times experienced numerous blackouts and has had the "shakes," even at work. Tr pages 70-74. After he graduated from high school, he served in the military as an enlisted man for 4+ years, during which time he married. In October 1991 he was divorced. One of the significant causal factors in the uncontested divorce was his ex-wife's complaint of his excessive drinking. Tr pages 55-57, 114-115. Due to his deteriorating relationship with his wife the Applicant voluntarily admitted himself as inpatient into a hospital's mental health unit on August 14, 1991. The Applicant was diagnosed by his treating physician as suffering from, *inter alia*, alcohol dependency and severe depression. He was discharged on September 6, 1991, into an aftercare outpatient counseling program (in connection with his employer's Employee Assistance Program) and a local Alcoholics Anonymous (AA) group. The Applicant took his first alcoholic drink after treatment in October 1991 when he was divorced, but remained sober thereafter for about eight months. Tr pages 76-77. He attended AA meetings from October 1991 to July 1992. Exhibit E. The Applicant lived with his girl friend, who was heavily involved with alcohol, from April 1992 to May 1995. Tr page 110; exhibit 2. He was sober again during the period October 1993 through May 1995 with the renewed support of consistent AA attendance. Tr pages 97-106, 110; exhibit E. The Applicant resumed alcoholic consumption in about May 1995 and plans to continue drinking. Exhibit 2; tr pages 79-83, 96-97, 111. He denies that he is an alcoholic and does not currently attend AA meetings. Tr pages 84, 117.

On the evening of March 17, 1996, the Applicant was arrested for Driving Under the Influence of alcohol (DUI). During that period of time he was suffering a "bout of depression" and was taking two prescription medicines, Prozac and Klonopin. Tr pages 41, 43, 93-96; exhibit 2, page 1. Prozac is an antidepressant, and Klonopin is an anti-seizure medicine.⁽¹⁾ The Applicant believes that the latter was prescribed for symptoms of anxiety. He had been drinking a total of about eight beers during the afternoon, with dinner, and after dinner on March 17, 1996. He deliberately waited two hours after drinking his last beer before driving his automobile. When arrested he was under the influence of alcohol and his prescription medicines. Tr page 91. The arresting officer told the Applicant that he had a strong odor of alcohol about his person and, later, that the Applicant had failed some field sobriety tests. Upon being arrested, the Applicant refused to take a breathalyzer test, even though he knew that his operator's permit would thereby be suspended, because he was unsure whether the breathalyzer would mistakenly register his ingestion of prescription medicines rather than alcohol. Tr page 93. The Applicant was released from jail the next day on a \$500 bond. On May 21, 1996, he pleaded *nolo contendere* to a reduced charge of "Less than Safe," found guilty thereof, and was sentenced to 90 days in jail suspended upon payment of a \$380 fine plus costs, four months' unsupervised probation, and 40 hours of community service. He was also required to complete a DUI Driver course in order to regain his operator's license.

His performance on the job has been satisfactory, and he possesses "some very good talents." He has never been drunk or smelling of alcohol while at work. Tr pages 123-134; exhibits A, B, D.

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 G - ALCOHOL CONSUMPTION

Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.

Conditions that could raise a security concern and may be disqualifying include:

- (1) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use;
- (2) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job;
- (3) diagnosis by a credentialed medical professional (cre-dentialed medical professional: licensed physician, licensed clinical psychologist, or board certified psych-iatrist) of alcohol abuse or alcohol dependence;
- (4) habitual or binge consumption of alcohol to the point of impaired judgment;
- (5) consumption of alcohol, subsequent to a diagnosis of alcoholism by a credentialed medical professional (credentialed medical professional: licensed physician, licensed clinical psychologist, or board certified psych-iatrist) and following completion of an alcohol rehabilitation program

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. ⁽²⁾

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. ⁽³⁾

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 G.

The Applicant has had a long history of binge drinking, has experienced blackouts and the "shakes," and has suffered disruption of his family life due in part to alcohol. He has been diagnosed as alcohol dependent by a credential medical professional. He has resumed drinking after inpatient treatment, outpatient counseling, and periodic Alcoholics Anonymous (AA) participation. The Applicant admits that he has had the "shakes" at work. He still denies that he is an alcoholic. He has been arrested for DUI less than a year before the close of the record. He admits that he was under the influence of alcohol when he was arrested. He was required to complete a DUI Driver course to regain his operator's license that was suspended because he refused to take a breathalyzer test when arrested. He is still drinking alcohol and is neither currently attending AA meetings nor seeking treatment for alcoholism. Each of the five DCs cited on page 4 *supra* have application to the facts of this case. The Applicant has offered little in the way of mitigating or extenuating evidence; certainly the MCs pertaining to Criterion G are inapplicable to those facts.

Each case decision is required to consider, as appropriate, the factors listed in Section F.3 and enclosure 2 to the Directive. Those factors are identified on page 5 *supra*. The Applicant has a serious and continuing alcohol problem that he denies. The absence of current rehabilitation as well as the relapse after treatment received as an inpatient in a hospital--and, indeed, education in the course of alcoholism--suggest recurring and deepening health problems yet await 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 G: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.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. Klonopin is the trade name of clonazepam in the benzodiazepine class of drugs. The *Physicians' Desk Reference*, 51st Edition (1997), p. 2294, provides the following warning concerning Klonopin:

Since Klonopin produces CNS [central nervous system] depression, patients receiving this drug should be cautioned against engaging in hazardous occupations requiring mental alertness, such as operating machinery or driving a motor vehicle. They should also be warned about the concomitant use of alcohol or other CNS-depressant drugs during Klonopin therapy.

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).

