

Date: April 7, 1997

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0814

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 7, 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 December 6, 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.

The undersigned Administrative Judge received the case assignment on January 16, 1997, and held a hearing on February 18, 1997. The Department Counsel presented six exhibits ("Exhs") and the testimony of no witnesses. The Applicant's case consisted of the presentation of three exhibits and the testimony of one witness besides his own. The undersigned Administrative Judge received the transcript ("Tr") of the hearing on February 28, 1997.

FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following criterion: paragraph 1, Criterion G (alcohol consumption). The Applicant has admitted the factual allegations contained in the subparagraphs of the SOR. 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 37-year-old employee of a U.S. Government contractor, which first hired him in 1989. The Applicant seeks to obtain a Secret personnel security clearance.

The Applicant drank alcohol from the time he was about 20 years old until September 1995, on occasion to excess, was sometimes hungover at work, and even experienced some blackouts. He was convicted of Driving Under the Influence of alcohol (DUI) in connection with arrests in 1989, 1993, and 1995. The Applicant was required by the sentence based upon his latest conviction to continue attending Alcoholics Anonymous (AA) meetings, at least once weekly, during the term of his probation. Exhibit 5, page 3. He successfully completed on December 2, 1996, the probation to which he was sentenced. Exhibit 5, page 5. He was diagnosed as alcohol dependent 303.90 apparently by a medical doctor. Exhibit 6; attachment to SOR answer; tr pages 112, 124. He was originally referred to a chemical dependency and relapse prevention program by personnel at his employer's Employee Assistance Program. The Applicant attended three-hour sessions four evenings a week for seven weeks and successfully completed that course of therapy. Tr pages 109-110; attachment to SOR answer. He voluntarily continues to attend weekly sessions of that group outpatient therapy as a "graduate" of the program and frequently brings his children. He has served as a guest speaker at those weekly sessions. Tr page 125. While the Applicant enjoys this outpatient program more than AA meetings and has no AA sponsor, he has periodically attended AA meetings, including an AA group at his place of employment, and he plans to find a permanent AA group that meets his needs as recommended by his alcohol counselor. Tr pages 49, 62-63, 68-69, 73, 97, 99-100, 107-112, 114-118, 127-128, 137, 139.

The Applicant took his last drink of alcohol in September 1995 when he was last arrested for DUI, intends never to drink alcohol again, and understands that his medical need for absolute abstinence will never abate. He has identified the triggers of his former alcohol abuse. Furthermore, he continues to have an adequate support structure in his 17-month effort to remain sober and knows whom he should contact should he ever relapse. Tr pages 34-35, 59-62, 74, 111, 114, 117-122, 126-131. The Applicant does not intend to drink again principally for health and family reasons rather than for reasons related to his security clearance or to his job. ⁽¹⁾ Tr pages 68, 119-120, 140. His medical doctor declares that the Applicant's prognosis is "excellent if he continues to work his program." Attachment to SOR answer.

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 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;

Conditions that could mitigate security concerns include:

(3) positive changes in behavior supportive of sobriety;

(4) following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional (credentialed medical professional: licensed physician, licensed clinical psychologist, or board certified psychiatrist).

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

The Applicant has had a long history of binge drinking in which his judgment has been impaired. This has resulted in three alcohol-related incidents and has impaired his work performance when hungover. Moreover, he has been diagnosed as an alcoholic by a credentialed medical professional. Thus, each of the DCs identified on pages 3-4 *supra* are applicable to the Applicant's history. There has, however, been no resumption of alcohol consumption after he was diagnosed with alcohol dependence by a credentialed medical professional. The Government does not rely on evidence of alcohol-induced fighting, spousal abuse, deterioration of the Applicant's health, drinking on the job or at lunch, or refusal to abstain from alcohol despite medical advice. His alcoholism has not resulted in gambling or other financial irresponsibility, nor has the Applicant shown any indication of discussing sensitive matters in inappropriate settings due to alcohol consumption.

On the other hand, he has had a marked improvement in mood and communicativeness and now avoids "trigger" situations. See MC#3 on page 4 *supra*. Finally, the Applicant has satisfied each of the factors listed in MC#4 also identified on page 4 *supra*, viz:

- The Applicant has successfully completed outpatient rehabilitation along with aftercare requirements;
- The Applicant participates frequently in meetings of an AA-similar organization; ⁽⁴⁾
- The Applicant has abstained from alcohol for a period of 17 months; and
- The Applicant has received a favorable diagnosis by a credentialed medical professional.

The Directive requires that the factors listed in Section F.3 and enclosure 2 to the Directive, identified on pages 4-5 *supra*, be considered, as appropriate, in making this decision. The seriousness of the Applicant's mental health problem is large, but he understands that and has taken appropriate steps to deal successfully and maturely with it. There is abundant evidence of rehabilitation and a reasonable probability that he will not relapse.

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: 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

DECISION

In light of all the circumstances presented by the record in this case, it is the determination of the undersigned that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Jerome H. Silber

Administrative Judge

1. The Applicant needs a personnel security clearance to work on a classified program central to his employer's financial future. In order to qualify for such work, he requires an FAA-certified license. He has now succeeded in obtaining such a license by completing a two-year **full-time** technical course and having passed both final tests. Tr pages 75, 123-124; SOR answer.

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 Government expresses concern that the Applicant has not attended AA meetings regularly as recommended by his friend, the alcohol counselor of his outpatient group. That group is itself, however, similar to Alcoholics Anonymous (AA)