

Date: June 30, 1997

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0093

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR THE GOVERNMENT

Michael H. Leonard, Esq.

Department Counsel

FOR THE APPLICANT

Stephen J. Dunn, Esq.

STATEMENT OF THE CASE

On January 28, 1997, 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 February 27, 1997, the Applicant responded to the allegations set forth in the SOR and requested a hearing. An amended answer to the SOR was filed on May 12, 1997. A copy of the SOR is attached to this Decision and incorporated herein by reference.

The undersigned Administrative Judge received the case assignment on April 9, 1997. The Applicant's counsel was unavailable for a hearing until on or after ay 21, 1997. The undersigned held a hearing on May 28, 1997. The Department Counsel presented five exhibits ("Exhs") and no witnesses. The Applicant's case consisted of the presentation of 12 exhibits and the testimony of two witnesses besides his own. The undersigned Administrative Judge received the transcript ("Tr") of the hearing on June 26, 1997.

FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following two criteria: paragraph 1, Criterion H (drug involvement); and paragraph 2, Criterion G (alcohol consumption). The Applicant has admitted the factual allegations contained in subparagraphs 1.b., 1.c., 1.g., 1.i., 1.j., 2.a., and 2.c. 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 30-year-old ----- employed by a U.S. Government contractor continuously since he was 19 years old. The Applicant seeks to retain a Secret personnel security clearance.

The Applicant is the second youngest child of eight children of his parents. His two older brothers have encountered alcohol problems, and one of them has been a sober, recovering alcoholic since about 1991. The Applicant modeled his behavior as a teenager on that of his "big brother" and started to experiment with marijuana when he found his brother's "stash" in 1984 when he was 17 or 18 years old. The Applicant smoked marijuana more than once a week from 1984 until 1996 (although there were occasions when he would not use it for a month at a time) and purchased it either monthly or every other month for personal use. His occasional sales of a marijuana cigarette (and once a quarter-ounce) to a friend were not for profit. He tried amphetamines twice in 1985 and hashish twice in the late 1980's, but never bought or sold either. The Applicant also purchased and snorted cocaine occasionally until May 1994 when his father died; his purchases and use then increased in frequency (and in 1995 included smoking crack cocaine as well).

His polysubstance abuse, including alcohol abuse, caused him marital and financial problems. Tr pages 140-141, 175, 181-182, 185-187. It may also have accounted for "some lapses in his performance" at work during 1995. Exhibit C. The Applicant started drinking alcohol when he was 12 or 13 years old, began drinking regularly in high school, getting drunk monthly. The frequency and quantity of his drinking gradually increased after he graduated in 1984 from high school until, after his father died in 1994, he was drinking 12-24 beers each weekend and 4-6 beers once every two weeks during the work week. In February 1996, the Applicant was drinking 4-5 beers a day as well as smoking marijuana and using cocaine 2-3 times a week.

The Applicant married his high school sweetheart in October 1989, and they have a two-year-old son. The Applicant cut back on his alcohol and cocaine use for the first few years of his marriage and, again, for a period of time when their son was born. On February 27, 1996, he sat down with his wife and mother and discussed what he realized were his addictions. He decided to enter an inpatient rehabilitation program at a facility where his sister-in-law had worked. Tr pages 112-116, 188. The Applicant told his employer and the governmental customer of his employer that he was voluntarily entering that program and required a leave of absence. Tr page 59. His co-workers were very supportive of his decision and helped his wife during his absence while in treatment.⁽¹⁾ The Applicant has never been arrested or involved in any alcohol-related criminal incident. Tr page 110. He never used drugs or alcohol while at work. Tr pages 56-57, 159-170.

The Applicant received inpatient treatment for 21 days (February 27-March 19, 1996) and thereafter in a four-month outpatient aftercare program (35 three-hour sessions) through July 18, 1996.⁽²⁾ His condition was diagnosed by the facility's medical director as "polysubstance dependence." Exhibit 5, page 3. Tr pages 199-200, 202-206, 215-216. He did not experience withdrawal symptoms and cooperated fully in the inpatient treatment program. On Saturday, July 6, 1996, the Applicant relapsed and had four beers at a civic party. Tr page 100. In the following few months, he drank about once a month, consuming 2-3 beers on each occasion, and used marijuana twice monthly in September and October and used crack cocaine once in October. His last use of cocaine was in October 1996, and his last use of marijuana was in November 1996. His last drink of alcohol was on December 3/4, 1996.

The Applicant began to realize in November 1996--when arguing with his wife--that he could no longer control his problems. The Applicant signed two sworn statements on December 6, 1996, for an agent of the Defense Investigative Service (DIS). He returned at that time to the facility where he had been an inpatient, intending to join a relapse prevention outpatient group, but was financially unable to do so because it was not covered by insurance. Tr pages 67, 213.

In the last six months the Applicant has been sober and abstinent of all illegal drugs and alcohol. He joined AA/NA "home" groups called "daily reflections" and "looking up." Tr page 90. He has an AA sponsor whom he got in January 1997. Exhibit K. He has a different NA sponsor. Exhibit J. He attends AA/NA meetings regularly and has learned the critical importance of sharing in the fellowship with other addicts. He keeps his NA keychains and his AA coins--symbolizing each additional month of abstinence--stacked on a bedroom shelf next to his wedding picture. Tr pages

148-150, 152. The Applicant attends three AA meetings a week (including a 12-step meeting on Sundays). He attends two or three NA meetings a week and baths and puts his son to bed one night a week. Tr pages 121-124, 150. He no longer associates with persons or goes to places he previously identified with substance abuse ("triggers"). Tr page 102. He attends church and prays for strength and guidance regularly, and his family life is "great" and "200 times better." Exhibit A. Tr pages 78-80, 179. He regularly reads passages from the AA "daily book," works the 12-step program frequently, and knows the "serenity prayer" of Alcoholics Anonymous. Tr pages 90-93. The Applicant's family is very supportive of his rehabilitation effort. Tr pages 143, 178. He does not believe he can ever consume alcohol in moderation, and he knows that alcohol is a trigger for illegal drug use. Tr pages 145-147, 150-151, 193, 218.

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;

Conditions that could mitigate security concerns include:

- (3) a demonstrated intent not to abuse any drugs in the future;
- (4) satisfactory completion of a drug treatment program prescribed by a credentialed medical professional (credentialed medical professional: licensed physician, licensed clinical psychologist, or board certified psychiatrist).

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:

- (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:

(3) positive changes in behavior supportive of sobriety;

(4) following diagnosis of alcohol abuse or alcohol de-pendence, the individual has successfully completed inpatient or outpatient rehabilitation along with after-care 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 medi-cal 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.⁽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, 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 Criteria H and G.

The Applicant voluntarily acquired over a period of years a clinical dependence upon alcohol, marijuana, and cocaine. He was so diagnosed by a credentialed medical professional in the spring of 1996 and will remain addicted to these three drugs indefinitely, though in full remission. He purchased them for his personal use (except for occasional sales of marijuana cigarettes to friends not for profit). He also experimented years ago with amphetamines and hashish. These activities fall within the scope of DC #1 and DC #2 under Criterion H and DC #4 under Criterion G, identified on pages 5-6 *supra*. Although he apparently completed inpatient treatment for polysubstance depend-ency successfully, he relapsed in July 1996 with alcohol--which led shortly to abuse of marijuana and cocaine. This exacerbates the disqualifying circumstances within the scope of DC #5 under Criterion G, identified on page 6 *supra*.

On the other hand, he has demonstrated an intent to abstain for the rest of his life from alcohol and illegal drugs--**demonstrated** through positive changes in behavior supportive of sobriety within the scope of MC #3 under Criteria G and H, identified on pages 5-6 *supra*. Regarding MC #4 under Criterion G (page 6 *supra*), the Applicant has participated almost daily in Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) meetings, but has been unable to afford to join a relapse prevention outpatient program that would lead to a prognosis by a medical doctor. Moreover, he has been abstinent from alcohol a scant six months (and only a little longer abstinent from illegal drugs) rather than the standard of "at least 12 months."

Some weight must be given to the fact that the Applicant voluntarily sought substance abuse rehabilitation, especially since it was not prompted by alcohol-related incidents, immediate health or financial crises, or work-related difficulties. There is a public policy as well as widespread corporate policies that favor Employee Assistance Program enrollments by substance abusers in the workforce.⁽⁵⁾ That policy would be grossly undercut by revocation of personnel security clearances for employees solely on the basis of their self-identification.⁽⁶⁾ This would not be the case here where the Applicant did not, unfortunately, remain abstinent after he completed the rehabilitation program he voluntarily sought.

Although the Applicant has not met the standards set forth in MC #4 under Criterion G, he has clearly met the standards

set forth under MC #3. The Directive does not, of course, compel the denial/revocation of personnel security clearances where an applicant meets some but not all explicit mitigating conditions under the self-described "guidelines." The Directive permits, moreover, deviations from those conditions where there is a clearly articulated reason to do so. Furthermore, the Directive requires that each clearance decision be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy (Section F.3).

This is a case that warrants deviation from the strict standard and the application of common sense to grant the continuation of a personnel security clearance. This Applicant has proven that he has rehabilitated himself from substance addiction in every conscientious way one could reasonably require, tested through careful and competent cross-examination of his witnesses and himself, and who presented himself at the hearing in an extremely candid, open, and responsible manner. It is not clear that another six months of abstinence will "tilt the balance" significantly more in his favor. Rigid application of the 12-month "standard" would be--from a common sense point of view--a waste of human resources in this particular fact pattern. The Applicant knows that at his youthful age of 30 he is really only at the beginning of a lifelong commitment to sobriety and that he cannot relax his grip on it even after December 1997.

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

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

Subparagraph 1.j.: For Applicant

Paragraph 2. Criterion G: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: 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 has received excellent evaluations at work as a top-rated employee. His supervisor, several co-workers, and senior employees of his employer's governmental customer unanimously agree on the Applicant's qualifications and dedication to work objectives. They know of his "courageous" decision to confront his addictions and to seek professional help voluntarily. Exhibit B through Exhibit I. Tr page 109.
2. The Applicant's wife attended a three-day family recovery program at AA, learning about co-dependency, during the Applicant's inpatient treatment and also attended Al-Anon meetings in order to be supportive of him. Tr pages 107, 183-184. On September 18, 1996, the Applicant received from the facility a certificate of successful completion of the "early recovery component" of the outpatient program. Exhibit L. He also attended some Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) meetings last year. During the spring of 1996 he had become complacent and slacked on going to those meetings. He did not get an AA/NA sponsor. He did not share in the AA/NA fellowship. He stopped working the step program. Exhibit A, page 2-3. Tr page 177.
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. Compare, for example, a December 24, 1996 memorandum from the Washington Headquarters Services to all employees on the subject of the OSD/JS drug-free workplace plan random drug testing in implementation of Ex. Ord. 12564. DoD direct-hire employees in "sensitive positions" were advised that the plan "provides the opportunity for an employee to voluntarily identify himself or herself as a user of illegal drugs prior to being identified through other means" and that "if the employee obtains counseling or rehabilitation through an Employee Assistance Program, and thereafter refrains from illegal drug use, the employee may not be subject to disciplinary action."
6. *See* mitigating factor number 5 of the former adjudication policy on alcohol abuse under the Directive: "If an individual's alcohol abuse was surfaced solely as a result of self referral to an alcohol abuse program and there have been no precipitating factors such as alcohol related arrests or incidents action will not normally be taken to suspend or revoke security clearance solely on the self referral for treatment." There is no reason to suppose that the considerations underlying this factor are inapplicable currently to adjudications of personnel security clearances after 1995.