

Date: July 2, 1997

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0159

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR THE GOVERNMENT

Carol A. Marchant, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF THE CASE

On February 14, 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 March 12, 1997, 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. A copy of the SOR is attached to this Decision and incorporated herein by reference.

The Applicant received a complete copy of the file of relevant material (FORM) on May 20, 1997. The Applicant also received an opportunity then to file objections and submit material in refutation, extenuation, or mitigation. The Applicant elected not to respond within the requisite 30 days, *i.e.*, June 19, 1997. The undersigned Administrative Judge received the case assignment on June 24, 1997.

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.b., 1.c., 1.d., 1.e., and 1.f. of the SOR. ^(U) 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 46-year-old ----- employed for the last 3½ years by a U.S. Government contractor. The Applicant seeks to retain a Secret personnel security clearance issued on February 25, 1994.

The Applicant had been employed as a ----- for over eight years until he was discharged in June 1992 for committing a felony--robbing a fast food store of \$222 in cash while on duty. In October 1992 he issued a check for \$106.49 at a local market while having insufficient funds to cover it. The Applicant repeatedly failed to appear for court dates on these charges and was arrested on fugitive warrants in August 1993, January 1994, ⁽²⁾ and August 1995. On November 30, 1995, he was arrested for shoplifting \$38 worth of cigarettes and paid \$300 in lieu of attending a court-ordered class on shoplifting.

On December 12, 1996, the Applicant signed a security clearance application (SF 86). In response to question 22 thereon concerning his employment record, he indicated that he left his ----- job in June 1992 under unfavorable circumstances, that is, "committed [*sic*] felony during work hours." In addition in the continuation space on page 9 of the form it was stated:

Local Records Check revealed employment suspension. See attached copy of adverse information report submitted to DISCO 8/14/95.

Attached to the signed SF 86 was the August 14, 1995 report to DISCO (FORM item 5) that reported that the Applicant had been arrested on August 7, 1995, for robbery. The Applicant responded to question 23 on the SF 86 concerning his police record by reporting that he had been arrested on bad check (1993) and shoplifting (1996) charges.

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;
- (2) a single serious crime or multiple lesser offenses.

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:

(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;

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.⁽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, the undersigned concludes that the Government established its case with regard to Criterion J.

The Applicant has a record of criminal activity for petty sums of money and/or property during 1992-95. This activity falls within the scope of DC #2--although the daylight unarmed robbery in 1992 was a serious felony within the scope of DC #1, identified on page 3 *supra*. The pattern of activity was comparatively recent, was not isolated, and was voluntary. There is little evidence of rehabilitation beyond the payment of fines, court costs, court-ordered restitution, *etc.*

Therefore, SOR ¶1.b through SOR ¶1.f are found adversely to the Applicant.

There is no evidence in the record that supports SOR ¶1.a and SOR ¶1.g; therefore those subparagraphs (which were denied by the Applicant in his answer to the SOR on March 12, 1997) are found favorably to the Applicant.

Having considered the evidence of record in light of the appropriate legal precepts and factors, the undersigned concludes that the Applicant successfully refuted and overcame the Government's case with regard to Criterion E.

SOR ¶2.a. alleges that the Applicant deliberately falsified his security clearance application (SF 86) on December 12, 1996, by knowingly concealing his robbery arrest (including fugitive warrant arrests) and his January 1994 arrest for stealing ten of his neighbors' newspapers. The evidence shows that his SF 86 in fact revealed the robbery and fugitive warrant arrests as well as his arrests on bad check and shoplifting charges. The Applicant had been arrested in January 1994 simul-taneously on both the fugitive robbery charge and the "petty larceny"⁽⁵⁾ charge (FORM item 11, page 4), and the Applicant had already admitted the newspaper theft charge to a Defense Investigative Service (DIS) agent in a signed sworn statement some seven months earlier (FORM item 13, page 1). The Government has not submitted sufficient proof of a knowing and willful falsification within the scope of DC #2, identified on page 4 *supra*. Therefore, SOR ¶2 and the related allegation in SOR ¶1.h are found favorably for the Applicant.

Each case decision is required to consider, as appropriate, the factors listed in Section F.3 and enclosure 2 to the Directive, identified on pages 4-5 *supra*. The seriousness of the Applicant's felonious activity, the recency and repetition of petty crime, absence of rehabilitative evidence, and the Applicant's mature age all weigh heavily against him. Dishonesty with the Government--unlike his neighbors and private businesses--has not been proven. Nevertheless, this Administrative Judge is unconvinced that the Applicant is more likely than not to refrain from crimes of opportunity in the future.

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.: For Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: For Applicant

Paragraph 2. Criterion E: FOR APPLICANT

Subparagraph 2.a.: 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 not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Jerome H. Silber

Administrative Judge

1. Inasmuch as the Applicant failed to admit or deny the factual allegations contained in SOR ¶1.h. in his March 12, 1997 answer, that SOR subparagraph is deemed to have been denied.

2. He was also arrested at the same time in January 1994 for stealing ten newspapers from neighbors. He was fined \$15 plus court costs of \$28 on a "Stealing Under \$150.00" charge.

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. Footnote 2 on page 2 *supra*.