

Date: July 23, 1997

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 97-0178

## **DECISION OF ADMINISTRATIVE JUDGE**

**JEROME H. SILBER**

### **APPEARANCES**

#### **FOR THE GOVERNMENT**

Pamela C. Benson, Esq.

Department Counsel

#### **FOR THE APPLICANT**

*Pro se*

### **STATEMENT OF THE CASE**

On February 26, 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 14, 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 April 28, 1997. [\(U\)](#) The Applicant also received an opportunity then to file objections and submit material in refutation, extenuation, or mitigation. The Applicant responded to the FORM on May 9, 1997, with 17 pages of documents, to which no objection to their admissibility was presented. The case record closed on May 9, 1997. The case was assigned on May 15, 1997, to Administrative Judge Mason and was reassigned for reasons of caseload balancing on July 8, 1997, to the undersigned Administrative Judge.

### **FINDINGS OF FACT**

The Statement of Reasons (SOR) consisted of allegations predicated on a single criterion: paragraph 1, Criterion G (alcohol consumption). The Applicant has admitted the factual allegations contained in each of the subparagraphs of the SOR except SOR ¶ 1.b. 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 44-year-old ----- employed by a U.S. Government contractor. The Applicant seeks to retain a Secret personnel security clearance granted in 1989.

The Applicant began drinking beer and hard liquor when he was about 15 years old. He continued consuming alcohol, sometimes getting intoxicated, until about 1988 when he realized he was starting to have serious problems with alcohol. He has experienced blackouts and has had nausea and shakes after drinking in the morning. He has consumed ½ a fifth of vodka three or four times a week and at times a full fifth in eight hours. He frequently could not control his anger when drinking. His last drink of alcohol (a fifth of alcohol) was on April 21, 1996.

The Applicant received outpatient alcohol treatment in about 1990 (was sober about three months thereafter) and in the autumn of 1993 (was sober eight or nine months thereafter). On April 14, 1996, he was arrested for threatening to kill his wife. He was intoxicated at the time. He entered a week-long inpatient detoxification program on April 22, 1996. (2) A credentialed medical professional diagnosed the Applicant's condition at that time as continuous alcohol dependence (303.91) on Axis I and alcohol withdrawal (291.8) on Axis III. Some suicidal ideation was noted. After detoxification he received outpatient treatment for about 4½ months, including attendance at Alcoholics Anonymous (AA) meetings. He had an AA sponsor. He decided to leave the outpatient program in August 1996 and to attend a 12-step program only, although his therapist thought that he was making a mistake. FORM item 8, page 142.

The Applicant has been tested negatively on his employer's random alcohol/drug tests six times since May 1, 1996, the last time being May 1, 1997. His supervisor for the last two years notes that the Applicant's alcoholism has never manifested itself in the quality or quantity of his work.

## 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;
- (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 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 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. <sup>(3)</sup>

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. <sup>(4)</sup>

## **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 G. The Applicant is a diagnosed alcoholic, having a history of habitual drinking to the point of intoxication and one alcohol-related incident. This falls within the scope of DC #1, DC #3, and DC #4, identified on pages 3-4 *supra*. On the other hand, he has shown positive changes in the last year when he has been able to maintain sobriety after successfully completing an inpatient detoxification program on April 29, 1996. He failed, however, to complete the aftercare outpatient program with his therapist's approval in August 1996. This falls within MC #3 and partially within MC #4, identified on page 4 *supra*. He has not participated frequently in meetings of Alcoholics Anonymous or a similar organization since the autumn of 1996 and has not received a favorable prognosis by a credentialed medical professional. The risk of relapse, which has recurred in the past, may be exacerbated by the lack of support organizations or personal counselors.

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 pages 4-5 *supra*. The Applicant has a serious alcohol problem that he is trying to control. It is unclear that he is safely rehabilitated yet. The probability of relapse is not so inconsiderable as to warrant a continuation of the security clearance of 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.

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Jerome H. Silber

Administrative Judge

1. FORM item 4 is an unsigned and incomplete Questionnaire for National Security Positions (SF 86) typed by DISCO. Because of its evidentiary inadmissibility it has not been considered by this Administrative Judge in issuing this decision.

2. The Applicant voluntarily reported his arrest and his inpatient treatment to the company's security officer.

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).