

Date: July 25, 1997

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0230

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 March 24, 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 April 17, 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 June 11, 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 to the FORM within the requisite 30 days, *i.e.*, on or before July 11, 1997. The record of the case, therefore, closed on July 11, 1997. The undersigned Administrative Judge received the case assignment on July 18, 1997.

FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following single criterion: paragraph 1, Criterion H (drug involvement). The Applicant has admitted the factual allegations contained in subparagraphs 1.e. through 1.k of the SOR, inclusive. 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 41-year-old ----- employed by a U.S. Government contractor. The Applicant seeks to retain a Secret personnel security clearance granted over 13 years ago by his present employer.

The Applicant has suffered from chronic kidney stones⁽¹⁾ for over twenty years. Due to the frequency and severity of the kidney stones, he was in excruciating pain for long periods of time. On occasion the pain persisted for 4-6 weeks. He has passed the stones numerous times without any medical procedures. The Applicant has also had surgery to remove stones. On four occasions they were removed by use of a cystoscope. He had the lithotripsy procedure performed six times and had a stent installed in his urinary tract twice. His physicians have over the course of his affliction pre-scribed various painkillers (narcotic analgesics) on Controlled Substances Act schedules of drugs with "a currently accepted medical use in treatment in the United States,"⁽²⁾ including Lorcet[®] (hydrocodone), Demerol[®] (meperidine), and Percocet[®] (oxycodone). When in the hospital, the Applicant has been prescribed morphine intravenously for intense pain. He has also taken a muscle relaxant, Soma[®] (carisoprodol),⁽³⁾ under prescription.

In about 1991, the Applicant became addicted to prescription analgesics. From October 1991 to June 1993 he had a severe bout with kidney stones and underwent the lithotripsy procedure four times. The Applicant began to abuse these drugs by using them more frequently than prescribed or in greater quantities than necessary. He became dependent upon them for day-to-day functioning. He obtained the medications under prescriptions from several doctors and also bought some.⁽⁴⁾

In 1995 the Applicant, realizing that he had a drug problem, referred himself to a doctor⁽⁵⁾ and participated in an outpatient alcohol/drug treatment program in October 1995 conducted by a licensed professional counselor. Although the Applicant completed the program, he had another kidney stone attack within a week and resumed abusing prescription drugs. On May 8, 1996, while driving a company vehicle under the influence of Percocet[®] and weaving from lane to lane, he was arrested for Driving Under the Influence (DUI). He pleaded *nolo contendere* in September 1996 and was fined. He was also suspended from his employment for 30 days.⁽⁶⁾ Upon his arrest the Applicant contacted the Employee Assistance Program (EAP) of his employer and continued to consult weekly with an EAP consultant through at least January 1997. The Applicant also went back to the doctor he saw in 1995, who suggested admission in a seven-week inpatient drug addiction rehabilitation program. He was admitted on June 24, 1996, and successfully completed that program in August 1996.

The Applicant last abused prescription analgesics on June 24, 1996. SOR answer, April 17, 1997. Since his discharge from the inpatient rehabilitation program in August 1996, he has faithfully attended meetings of Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) several times each week--and daily during many weeks. His leadership in NA is inferred from the fact that he was made the secretary of his NA group. He feels great, intends to stay away from any type of drug use in the future, and intends to stay active in his AA/NA groups. FORM item 7, page 2. He has tested negative on all the random drug tests at work. He also is supported in his desire for a drug-free lifestyle by his parents, wife, and three children all of whom live in his hometown. See FORM item 4; FORM item 6, page 7.

The Applicant had another kidney stone attack for which he was hospitalized in November 1996. When he was admitted on that occasion, the Applicant alerted the hospital staff that he was (and remains) a recovering drug addict. The doctors at the hospital carefully monitored all his medications. FORM item 7.

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);

(3) failure to successfully complete a drug treatment program prescribed by a credentialed medical professional (credentialed medical professional: licensed physician, licensed clinical psychologist, or board certified psychiatrist). Current drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will normally result in an unfavorable determination.

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).

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. [\(7\)](#)

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. [\(8\)](#)

CONCLUSIONS

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

The Applicant has a five-year history of abuse of prescription painkillers. The Directive defines the term "drug abuse" to include the "use of a legal drug in a manner that deviates from approved medical direction." Page 4 *supra*. In addition, the Applicant experimented with marijuana, an illegal drug, over a six-month period. This conduct falls within the scope of DC #1, identified on page 5 *supra*. A drug-related incident at work is also involved. Moreover, his relapse within a week of completing an outpatient rehabilitation program in the autumn of 1995--although due to a kidney stone attack rather than to his addiction--raises a serious concern as to whether he had "failed to successfully complete" the program within the scope of DC #3, identified on page 5 *supra*. There is, of course, a manifest distinction between the facts in this case and the more problematic case in which an applicant outright refuses to comply with competent medical

direction to enroll in a rehabilitation program or in which an applicant quits halfway through the program. Nevertheless, any relapse within the last two years before the record closes in a case requires considerable pause and ought not to be just dismissed when evaluating the current risks of relapse. Finally, a medical diagnosis of substance dependence by a credentialed medical professional, rather than one of substance abuse, increases those risks.

Estimates of the prevalence at all economic levels of prescription drug abuse throughout our society has often been attempted in authoritative journals. It may be gauged by the reported numbers of patients involved in rehabilitation programs, retreats, camps, *etc.* It suffices for present purposes to note simply that abuse of legal drugs is widespread and just as endemic within the United States as the abuse of illegal drugs. The easy availability of prescription painkillers despite rigorous enforcement of Federal law and pharmaceutical regulations is, unfortunately, seen in the instant case. See page 3 *supra*. Here, the Applicant's addiction appears to have led to his abuse rather than *vice versa*. The potential for addictive side effects of narcotic analgesics is noted annually in the *Physicians' Desk Reference* and warned those who prescribed them for the Applicant. The issue in this case is not whether the Applicant is addicted to painkillers nor is it whether a drug addict can ever be eligible for a personnel security clearance.

The crucial issues based on the entire record in this case, rather, are whether there has been sufficient rehabilitative efforts of sufficient intensity over a sufficient time period with sufficient support of friends, sponsors, and professional advisers to justify a prudent conclusion that the likelihood of prolonged relapse in the future is minimal. This Administrative Judge reaches that conclusion. The Applicant has demonstrated his intent not to abuse any drugs in the future and has satisfactorily completed in August 1996 a drug treatment program prescribed by a credentialed medical professional. This falls within the scope of MC #3 and C #4, identified on page 5 *supra*. But that is not the end of a searching inquiry into the Applicant's security clearance eligibility. The Applicant has engaged wholeheartedly in a continuing aftercare program and has a close support structure to deal with relapse triggers. He has been clean for over a year. His job is at stake every time he takes a random drug test at work. Yet, the fact that "tips the balance" in his favor is the mature manner in which he handled the kidney stone attack in November 1996 in contrast to his reaction to the one he suffered in the autumn of 1995. The Applicant needed inpatient treatment, not just outpatient counseling.

The Directive requires that the factors listed in Section F.3 and enclosure 2 to the Directive, identified on pages 5-6 *supra*, be considered, as appropriate, in making this decision. The seriousness of the Applicant's addiction, a mental health problem, is large, but he understands that and has taken appropriate steps to deal successfully and maturely with it. His addiction to painkillers was not caused willfully or voluntarily through immature, abusive experimentation. He has not abused drugs from June 24, 1996, to at least the close of the record on July 11, 1997. There is abundant evidence of rehabilitation and a reasonable probability that he will not relapse. Should there be a relapse, there is a support structure available and competent to catch him.

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

Subparagraph 1.k.: 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 medical term for kidney stones is "renal calculi."

2. Title 21 United States Code, § 812(b).

3. Soma[®] is sometimes manufactured in tablets that contain aspirin or codeine, or both. *Physicians' Desk Reference* (1997), pp. 2783-84. There is no evidence that the Applicant used these compound tablets.

4. The Applicant also smoked marijuana cigarettes about 20 times commencing in November 1995 to about May 4, 1996. The cigarettes were given him by other patients he met while enrolled in an outpatient alcohol/drug treatment program in October 1995. The Applicant never purchased, sold, or participated in the cultivation of marijuana and has not been involved with any other illegal drug.

5. The doctor diagnosed the Applicant as opioid dependent (304.00) when discharged on September 27, 1995, from overnight inpatient detoxification. The doctor noted in his discharge summary that the patient had been taking prescription painkillers daily. FORM item 6, page 2.

6. FORM item 7, page 1. There is **no** evidence, corroborated or uncorroborated, whatsoever **provided to the Applicant** (other than the bare admission **provided by the Applicant**) to substantiate the SOR subparagraph 1.i. allegations. *Cf.* SOR ¶ 1.j. Although item 14 of the Additional Procedural Guidance (Enclosure 3 to the Directive) imposes on Department Counsel the responsibility for presenting evidence to establish controverted facts (see footnote 5 on page 8 *infra*), item 7 imposes the **further mandatory** responsibility in non-hearing cases, such as the instant case, on the Department Counsel of "providing the applicant with a copy of all relevant and material information that could be adduced at a hearing." The absence of such evidence regarding SOR subparagraph 1.i. in the FORM compels the conclusion that no such evidence is in the possession of Department Counsel.

7. 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).

8. 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).