

Date: _August 21, 1997_

In re:

Applicant for Security Clearance

ISCR Case No. 97-0275

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR THE GOVERNMENT

Matthew E. Malone, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF THE CASE

On April 15, 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 May 3, 1997, the Applicant responded to the allegations set forth in the SOR and elected to have his case decided 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 26, 1997. 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 July 22, 1997, and his response was received by DOHA on July 25, 1997. The record in this case closed on July 25, 1997. The case was assigned on July 28, 1997, to Chief Administrative Judge Gales and reassigned to the undersigned Administrative Judge for caseload reasons on August 1, 1997.

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. [\(U\)](#) 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 51-year-old electrical engineer employed by a U.S. Government contractor. The Applicant seeks to obtain a personnel security clearance. He held a personnel security clearance continuously from 1968 when he was

graduated from college until January 1994 when he resigned and had been employed at his current employment location continuously for nearly 22 years until January 1994.

The Applicant began consuming alcohol in his late teens. FORM item 9, page 4. In December 1971 he was arrested for driving under the influence of liquor. FORM item 12. On September 28, 1980, he was arrested for Driving While Intoxicated (0.27% BAC) and, upon pleading no contest in April 1981, was fined and required to complete a driver's safety course. FORM item 10, page 2.

The Applicant believes that he is addicted to alcohol and has been for decades, experiencing blackouts, seizures, disorientation, and withdrawal symptoms. FORM item 7, page 1. There is no diagnostic evidence, however, that he suffered delirium tremens as alleged in SOR ¶ 1.a. *See* DSM-IV, pages 129-132, 198. He was sober between December 1976 and July 1978. Form 9, page 4. He was sober from October 1980 until September 1995 and has been sober for seven periods (each of a year or more) all together. FORM response, pages 2-3. The Applicant considered himself a "binge drinker" who would drink to excess during those time periods when he was drinking. FORM response, page 2.

In December 1995 the Applicant tried to quit drinking "cold turkey" by himself, suffered seizure withdrawal symptoms, and had to be treated inpatient for detoxification for six days. FORM response, page 3; FORM item 7, page 1. He was sober from the date of his discharge until he voluntarily admitted himself for inpatient detoxification for a week in July 1996. FORM item 7, page 1. The Applicant last had an alcoholic drink in June 1996. FORM response, page 3.

Except during the two periods of inpatient detoxification treatment, the Applicant has not had any professional substance abuse treatment, rehabilitation, counseling, or psychiatric treatment. FORM response, page 3; FORM item 7, page 1; FORM item 8, page 1; FORM item 9, page 4. He has attended Alcoholics Anonymous (AA) meetings periodically over the years and has sought to educate himself through the study of literature about alcoholism, its treatment, and the relative risks of relapse. FORM item 9, pages 2-3; FORM response, pages 2-5. The Applicant's work has not been adversely affected by his alcoholism. FORM item 9, pages 4-5; FORM response, page 4.

POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluating 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;
- (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;

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 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.⁽³⁾

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 has had a lengthy alcoholic history involving binges, followed by sobriety, followed by relapses, *etc.*, and two alcohol-related incidents. This conduct falls within the scope of DC #1 and DC #4, identified on page 3 *supra*. The seriousness of his illness is demonstrated by his relapse last year months after he was institutionalized for detoxification. On the other hand, his voluntary self-admission for a second detoxification program--promptly upon being shocked at his slip-- and the extensive self-education that he has undertaken since December 1995 weigh positively for the Applicant. This conduct falls within MC #3, also identified on page 3 *supra*. Given his long-standing medical history, an inpatient rehabilitation program (not just a detoxification program) of several weeks' duration, leading to a favorable prognosis by a credentialed medical professional (MC #4), would seem to be indicated, particularly since the Applicant once relapsed after nearly five years of continuous sobriety. In absence of documented diagnoses by credentialed medical professionals, his inpatient treatment, by itself, is supportive of security clearance eligibility. Therefore, SOR ¶ 1.d. and ¶ 1.e. are found favorably to the Applicant. Likewise, SOR ¶ 1.f. is concluded favorably to the Applicant because his intention to remain sober notwithstanding his recognition of its difficulty is supportive of security clearance eligibility.

The Directive requires that the factors listed in Section F.3 and enclosure 2 to the Directive, identified on page 4 *supra*, be considered, as appropriate, in making this decision. The seriousness of the Applicant's mental health problem is large, but he has taken modestly appropriate steps to deal with it. The Applicant, however, is still at an "intellectual level" in accepting his disability. His strong resolve to remain abstinent based upon an understanding of the nature of his illness weighs in the Applicant's favor and is the most encouraging evidence in the record. There is some evidence of recent rehabilitation although several years of sobriety will be necessary to satisfy legitimate current personnel security concerns.. This Administrative Judge is unable to find a reasonable probability that the Applicant at his rather mature age will remain sober the rest of his working life. On balance, SOR ¶ 1 is found adversely to 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.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: 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. There is **no** evidence, corroborated or uncorroborated, whatsoever **provided to the Applicant** (other than the bare admission **provided by the Applicant**) to substantiate the allegations concerning the diagnoses and recommendations cited in SOR subparagraphs 1.d. and 1.e. 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 3 on page 6 *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 subparagraphs 1.d. and 1.e. in the FORM compels the conclusion that no such evidence is in the possession of Department Counsel.

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).