

Date: August 22, 1997

In re:

Applicant for Security Clearance

ISCR Case No. 97-0330

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR THE GOVERNMENT

William S. Fields, Esq.

Deputy Chief Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF THE CASE

On May 9, 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 written statement dated May 14, 1997, sworn to and signed on May 27, 1997, the Applicant responded to the allegations set forth in the SOR and requested a hearing. A copy of the SOR is attached to this Decision and incorporated herein by reference.

The undersigned Administrative Judge received the case assignment on June 13, 1997. The undersigned held a hearing on August 12, 1997. The Department Counsel presented six exhibits ("Exhs") and the testimony of no witnesses. The Applicant's case consisted of the presentation of three exhibits and his own testimony. The undersigned Administrative Judge received the transcript ("Tr") of the hearing on August 21, 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 subparagraph of the SOR, other than SOR ¶ 1.i. 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 29-year-old senior electronics install technician employed by a U.S. Government contractor. The Applicant seeks to retain a Secret personnel security clearance.

The Applicant has consumed alcohol since he was about 15 years old, periodically to the point of intoxication, until June 14, 1997. He enlisted in military service when he was 18 years old in 1986 and served on active duty until his honorable discharge in January 1994. While on active duty the Applicant received non-judicial punishment twice for alcohol-related incidents. Exh. 5. He was also convicted in 1989 for drinking in public (open container) and in 1990 for Driving While Intoxicated (0.17% BAC). Shortly after the latter arrest, the Applicant deployed overseas in support of Operation Desert Storm. Upon his return from that deployment, his military service required him to be admitted to an inpatient treatment program at one of its alcohol rehabilitation centers on July 23, 1991. Tr page 41. He completed that program on August 30, 1991, and participated in the recommended aftercare. Tr pages 42-43.

Several weeks after his discharge in January 1994 the Applicant was placed on two weeks' leave without pay by his employer after he missed boarding a departing ship on which he was assigned to work. He had overslept after drinking the night before in celebration of his 26th birthday. Exh. 3, page 3. On July 15, 1994, the Applicant was involved in an automobile accident in which the other driver was issued a citation. However, the Applicant tested at 0.08% BAC (after drinking about four beers over a two-hour period) and was charged with Driving Under the Influence of Alcohol (DUI). Tr pages 44-45. During January-April 1995 he attended and successfully completed an alcohol safe driving education course and a comprehensive substance abuse program. Each course involved his weekly attendance. The DUI charge was dismissed in court. He has not had any alcohol-related incidents within the past three years. Tr page 52.

The Applicant met his wife in March 1994 and married her on October 13, 1995. They gained custody of her two sons from a previous marriage in April 1996. The Applicant decided with his wife to "clean up their act" thereafter to deny any opportunity for someone to take the children away from them. Tr pages 35-38, 40. He has taken on new responsibilities with his marriage and no longer thinks that his personal decisions affect only himself. Tr pages 47, 51-52. He has matured considerably and his life has changed dramatically since his marriage. Tr pages 54, 58. His last drink was a beer the evening before Father's Day 1997. Tr page 49. The Applicant no longer has the desire to drink and probably would not drink even if he had the desire for alcohol. Tr page 50. He has good job recommendations from his supervisors, both from his previous employer and from his current employer.

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;
- (2) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job;
- (4) habitual or binge consumption of alcohol to the point of impaired judgment;

Conditions that could mitigate security concerns include:

(2) the problem occurred a number of years ago and there is no indication of a recent problem;

(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. [\(1\)](#)

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. [\(2\)](#)

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of the witness who testified, the undersigned concludes that the Applicant successfully rebutted and overcame the Government's case with regard to Criterion G.

The Applicant had five alcohol-related accidents while in the service in 1988-94 and another that affected his job performance shortly after his military discharge in 1994. This conduct falls within the scope of DC #1 and DC #2, identified on pages 3-4 *supra*. He had a pattern of binge drinking that at times impaired his judgment within the meaning of DC #4, identified on page 4 *supra*. On the other hand, he has never been diagnosed as an alcoholic, an alcohol abuser, or as alcohol dependent by any credentialed medical professional within the meaning of DC #3 and MC #4. This is the state of the evidence in the record before this Administrative Judge notwithstanding the fact that he received inpatient treatment in 1991. His is a history of youthful over-indulgence and irresponsibility while single and in the service. There is substantial credible evidence that, with his marriage in 1995 and his new-found responsibility for stepchildren, he has made very significant alterations in his outlook and behavior supportive of sobriety. This falls within the scope of MC #3, identified on page 4 *supra*. While he still drinks on occasion, he has not had an alcohol-related incident in more than three years, and there is little indication that he has had a problem consuming alcohol in those three years. This falls within the scope of MC #2, also identified on page 4 *supra*. His behavior on and off the job in recent years demonstrates a commitment to reliable conduct, to the use of good judgment, and particularly to responsible and lawful drinking.

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 nature and seriousness of his former drinking pattern weigh against the Applicant, although his age and immaturity during which it occurred is viewed in mitigation. His former pattern of intoxication did not occur within the recent past and took place under personal circumstances unrepresentative of his current situation. There is a high probability that he will not abuse alcohol in the future. Therefore, SOR ¶ 1 is concluded favorably 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: 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

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 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).

2. 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).