

DATE: January 30, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0416

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esq., Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On September 25, 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 October 27, 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.

The Applicant received a complete copy of the file of relevant material (FORM) on November 14, 1997, and 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 day, *i.e.*, on or before December 14, 1997. The record in this case closed on December 14, 1997. The undersigned Administrative Judge received the case assignment on January 20, 1998.

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 D (sexual behavior). The undersigned Administrative Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following Findings of Fact:

The Applicant is a 42-year-old aircraft mechanic employed by a U.S. Government contractor. The Applicant seeks to retain a Secret personnel security clearance.

The Applicant served as an enlisted man for twenty years on active military duty and was honorably discharged as an E-

7 in August 1996. The Applicant has recently celebrated his twentieth wedding anniversary. He has a spotless police record with the following exception.

In January 1997 the Applicant entered an Alford plea of guilty (notwithstanding his belief in his innocence) to two state felonies, *viz.*, commission of indecent liberties with a child and crime against nature. These charges were based upon the allegation that in September 1995 the Applicant abused a five-year-old child in his temporary care and custody by putting his penis in the child's mouth. He was fined \$500, ordered to pay costs of \$90, and sentenced to incarceration for 16-20 months suspended except for 120 days (served only on weekends). The Applicant was placed on supervised probation for 36 months. He was required to undergo a mental health examination and to participate in any recommended sexual abuse treatment program. He is consequently attending a weekly program of treatment.

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 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:

- (2) the crime was an isolated incident;

CRITERION D - SEXUAL BEHAVIOR

Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, subjects the individual to undue influence or coercion, or reflects lack of judgment or discretion. The adjudicator should also consider guidelines pertaining to criminal conduct (criterion J); or emotional, mental, and personality disorders (criterion I), in determining how to resolve the security concerns raised by sexual behavior. (Sexual orientation or preference may not be used as a basis for or a disqualifying factor in determining a person's eligibility for a security clearance)

Conditions that could raise a security concern and may be disqualifying include:

- (1) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

Conditions that could mitigate security concerns include:

- (3) there is no other evidence of questionable judgment, irresponsibility, or emotional instability;

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, the undersigned concludes that the Government established its case with regard to Criteria J and D.

The Applicant's Alford plea of guilty to the felony charges collaterally estops him in this administrative proceeding from now relitigating the elements of those offenses. *See* ISCR Case No. 94-1213 (June 7, 1996); ISCR Case No. 95-0817 (Feb. 21, 1997); ISCR Case No. 96-0587 (March 24, 1997). The Applicant did not, in fact, protest his innocence in his answer to the SOR. He simply noted that it "was a single incident that occurred [*sic*] . . . for which [he is] deeply sorry." Remorse is relevant evidence but is not necessarily sufficient evidence of rehabilitation or other mitigation.

The record evidence falls within the scope of DF #1 and DF #2 under Criterion J and DF #1 under Criterion D, which are identified on pages 3-4 *supra*. There is no diagnosis of emotional, mental, or personality disorders although he is participating--after "evaluation"--in a program for sexual abuse treatment. In mitigation it is noted that the incident, though fairly recent, was isolated and that there is no other evidence of questionable judgment or irresponsibility. *See* MF #2 under Criterion J and MF #3 under Criterion D. However, the gravity of the offenses outweighs the mitigating factors as presented in the FORM. Therefore, SOR ¶ 1 and ¶ 2 are concluded adversely to the Applicant.

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 page 4 *supra*. The nature and seriousness of the conduct, its recency, and the Applicant's age weigh heavily against him. It is much too early in his treatment program to conclude that a recurrence of the conduct is relatively unlikely.

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.: Against Applicant

Paragraph 2. Criterion D: AGAINST APPLICANT

Subparagraph 2.a.: 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.

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).