

Date: October 14, 1997

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0464

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR THE GOVERNMENT

William S. Fields, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF THE CASE

On July 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 sworn written statement, dated July 28, 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 August 21, 1997, and held a hearing on October 2, 1997. The Department Counsel presented two exhibits ("Exhs") and the testimony of no witnesses. The Applicant's case consisted of his own testimony and the presentation of no exhibits. The undersigned Administrative Judge received the transcript ("Tr") of the hearing on October 8, 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 each of the subparagraphs of the SOR. 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 20-year-old junior draftsman employed by a U.S. Government contractor. The Applicant seeks to obtain a Confidential personnel security clearance.

In August 1991 few weeks before the Applicant entered high school at age 14, he began to use marijuana with his friends and classmates. He smoked marijuana one or twice a week for the next two years. He smoked marijuana daily during 1993-95 until he graduated in May 1995. He typically contributed anywhere from \$5 to \$10 a week with his friends to buy marijuana. The Applicant estimates that three-fourths of the student body of his high school was involved with marijuana and/or other illegal drugs. He was told on one occasion that a marijuana cigarette he smoked also had hashish in it, but he was not sure, and it had no special effect on him. He also experimented with LSD given to him on three occasions during the December 1994-February 1995 period.

For the year after high school graduation the Applicant reduced his use of marijuana to about three times a week. He did take a puff or two on marijuana cigarettes offered to him on four different occasions in the July-November 1996 period. In a signed, sworn statement that the Applicant gave to a Defense Investigative Service (DIS) agent on April 18, 1997, he declared that he had "no intentions of using the drug in the future" and added that "[m]y future is more important to me than the use of any type of illegal substance." Exh. 2, page 2. ⁽¹⁾ Nevertheless, the Applicant took a puff on an offered marijuana cigarette in August 1997, about a month or six weeks before the hearing, and after he had responded to the SOR. Tr pages 33-40. He regretted that action and declares that he has learned that marijuana use is not "conducive to a good future" and would not like any future children of his to be born with defects attributable to drug usage. Tr pages 41-43.

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 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) and

(b) inhalants and other similar substances.

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);

(2) illegal drug possession, including cultivation, process-ing, manufacture, purchase, sale, or distribution;

Conditions that could mitigate security concerns include:

(3) a demonstrated intent not to abuse any drugs in the future;

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, and having assessed the credibility and demeanor of the Applicant who testified, the undersigned concludes that the Government established its case with regard to Criterion H.

The Applicant's illegal drug purchases and use during and after high school were both regular in frequency and prolonged. This conduct falls within the scope of DC #1 and DC #2, which are identified on page 4 *supra*. In the last two years he has moved out of his mother's home, attended a community college, and has had several jobs, leading to his present professional position. It has, moreover, been more than two years since he used marijuana daily. These have been significant changes in his life. However, he has continued to socialize with his former high school friends in the past year or so and has taken a puff on a marijuana cigarette they offered him on five different occasions. The last time occurred (1) after his instructor hired him and told him that current illegal drug abstinence was important ⁽⁴⁾ and, indeed, (2) after he responded to the SOR on July 28, 1997. This conduct fails to **demonstrate** an intent not to abuse drugs in the future within the scope of MC #3, which is identified on page 4 *supra*.

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, seriousness, frequency, and recency of his drug involvement all militate against the Applicant. His youthful age and relative inexperience weigh in his favor. The absence of rehabilitation and the reasonable likelihood that the Applicant will continue to use marijuana when presented to him in certain social contexts are unfavorable in his case. Complete abstinence from all illegal drug involvement for a period of time beyond twelve months would strengthen his security clearance application. Therefore, Criterion H is concluded 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 H: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: 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 Applicant began work at his present job on December 2, 1996, having been hired by a man who was also his instructor in a community college course in which the Applicant was enrolled. The man told the Applicant that past use of illegal drugs "shouldn't be a problem" as long as the Applicant was not a current user. Tr page 32.

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).

4. See footnote 1 on page 2 *supra*.