

DATE: March 27, 1998

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 97-0669

**DECISION OF ADMINISTRATIVE JUDGE**

**JEROME H. SILBER**

**APPEARANCES**

**FOR GOVERNMENT**

Teresa A. Kolb, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**STATEMENT OF THE CASE**

On October 6, 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 24, 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 January 12, 1998. The Applicant also received an opportunity to file objections and submit material in refutation, extenuation, or mitigation. The Applicant's response to the FORM was mailed on February 11, 1998, and was received by DOHA on February 17, 1998. A further response by the Applicant to the FORM was dated February 25, 1998, and submitted pursuant to an extension of time that was granted the Applicant by DOHA. The record in this case closed on February 26, 1998, when the second response was received by DOHA. The undersigned Administrative Judge received the case assignment on March 6, 1998.

**RULINGS ON PROCEDURE**

On February 24 and March 5, 1998, the Department submitted written objections to the admissibility of three documents submitted by the Applicant on the grounds that they are hearsay not subject to cross-examination or, in the alternative, urged that they be given little weight.<sup>(1)</sup> The Department Counsel did not move, in conjunction with those objections, to request a hearing at which the authors of the documents could be cross-examined if the Applicant presented their testimony.<sup>(2)</sup> Pursuant to item 19 of the additional procedural guidance (encl. 3 to the Directive), the Federal Rules of Evidence are relaxed to permit the development of a full and complete record; consequently, the objections are overruled, and the three documents are admitted. The weight accorded them has taken into consideration the absence of

testing through cross-examination and *voir dire* of claimed expertise.

## **FINDINGS OF FACT**

The Statement of Reasons (SOR) consisted of allegations predicated on the following single criterion: paragraph 1, Criterion H (drug involvement). 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 professional engineer employed by a U.S. Government contractor since September 1996. He was 44 years old at the time the record in the case closed. The Applicant seeks to obtain a Secret personnel security clearance.

The Applicant first smoked marijuana and hashish in college when he was about 18 years old in 1971. Until he graduated with a major in physics, his use of these drugs consisted of puffs on a cigarette or pipe in social settings a few dozen times over a six year period. After graduation he reduced his use of each of these drugs to a frequency of once or twice a year over an eight year period. During this period he also sniffed cocaine once a year or every other year. From 1985 to February 1995, when he had a personnel security clearance the Applicant reduced the use of these drugs to four or five times (marijuana and hashish each) and one or twice (cocaine) in the early 1990's. The Applicant contributed to the purchase of these drugs at parties during 1971-95. He has never profited from the sale of these drugs. He has never abused prescription drugs or any other illegal drugs. He has never produced illegal drugs. He has never been arrested for any drug offense. He has never been treated for drug abuse. He has never used any illegal drug since February 1995.

The Applicant does not intend to ever use illegal drugs while holding a security clearance. Moreover, he does not intend to ever use marijuana again as long as it is illegal to do so. He admitted that he "could" use marijuana in the future if it were both legal and if he did not hold a security clearance.

In a sworn statement, signed on August 11, 1997, the Applicant stated: "The difference between why I previously used illegal substances while holding a clearance, and I have not since Feb 95 is that I have grown up some more, I have better things to do with my time, and its not nearly as much fun or as acceptable; its not part of life much anymore. Also, the face of the workplace has changed a lot: there used to be much more of an atmosphere of partying, such as having several drinks at lunch during the workday. Times have changed."

Upon receiving the FORM, the Applicant sought the assistance of his employer's Employee Assistance Program, which referred him to a Certified Alcohol and Drug Abuse Counselor and to a certified addictions counselor (Ph.D.) who is part of the Applicant's medical plan. The former administered standard screening questionnaires to the Applicant and found no indications of "prior or present signs of substance abuse or chemical dependency." The latter found that the Applicant "does not fit the criteria for alcohol abuse or having a diagnosis of substance abuse." The latter presumably was referring in his statement to the criteria for substance dependence and substance abuse in DSM-IV, pages 181-183. This evidence is sufficient to find that, from a medical and/or psychiatric point of view, the Applicant does not abuse any illegal substance.

## **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)

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, processing, manufacture, purchase, sale, or distribution;
- (3) . . . 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:**

- (1) the drug involvement was not recent;
- (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.<sup>(3)</sup>

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.<sup>(4)</sup>

## 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 record evidence demonstrates that the Applicant has a lengthy history of occasional abuse of marijuana, hashish, and cocaine and has purchased these illegal drugs for his personal use. This evidence falls within the scope of DC #1 and DC #2, which are identified on page 4 *supra*. However, his conduct does not fall within the scope of DC #3 because he is not currently involved with illegal drugs--although he had been involved for a considerable time in the more distant past when he held a security clearance--and because he has not "expressed an intent not to discontinue use of such drugs." He has been continuously abstinent for the last three years (MC #1) and has thus demonstrated, by virtue of such abstinence, his intent not to abuse any drugs in the future (MC #3, identified on page 5 *supra*). It must be emphasized that the applicable definition of "drug abuse" is that which is contained in the adjudicative guidelines rather than that contained in DSM-IV. However, it must also be emphasized that any "drug abuse" is a matter of security concern and **may** be disqualifying, but "drug abuse" as so defined is not unmitigable *pre se*.

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 5 *supra*. The Applicant has seemingly "learned his lesson," albeit late in life, and the likelihood of any recurrent use by him is slight. His abstinence may also be accounted as a graphic example of a measure of success in the Federal Government's highly publicized war on drugs, including its drug-free workplace program. As he himself said, "Times have changed."

## **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

## **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.

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Jerome H. Silber

Administrative Judge

1. By letter dated March 16, 1998, the Applicant indicated that he had not received a copy of these objections until transmitted by the Administrative Judge's March 9, 1998 order. The Applicant's letter was provided to the Department Counsel on March 18, 1998 by the Administrative Judge. All communications addressed to an administrative judge from a party should be simultaneously provided to the other party.

2. Such a procedural motion would be in order, and if good cause is shown, the administrative judge may grant it. *See* DISCR OSD Case No. 93-0239 (Sept. 7, 1994) at 5.

3. 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).

4. 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).

