

DATE: April 8, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0751

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR GOVERNMENT

Pamela C. Benson, Esq., Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On November 7, 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, notarized on November 30, 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 February 17, 1998, and received an opportunity then to file objections and submit material in refutation, extenuation, or mitigation. The Applicant responded on March 7, 1998.⁽¹⁾ The record in this case closed on March 7, 1998. The undersigned Administrative Judge received the case assignment on March 20, 1998.

FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following three criteria: paragraph 1, Criterion J (criminal conduct); paragraph 2, Criterion E (personal conduct); paragraph 3, 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 23-year-old computer-assisted design drafting technician employed since August 1997 by a U.S. Government contractor ("Employer #2"). The Applicant seeks to obtain a Confidential personnel security clearance.

The Applicant experimented with marijuana in the 1990-93 period. He was arrested for disturbing the peace in 1990 or 1991 and fined \$25; he was also charged with underage drinking in about 1992 and fined \$100 or \$200. The Applicant

was arrested in May 1996, when he was 21 years old, and charged with possession of marijuana and drug paraphernalia, for which he was sentenced to three months' probation without verdict and fined \$272 including court costs. A separate charge of retail theft was *nolle prossed*. In August 1996 the charges made in May 1996 were expunged. The Government's evidence does not reveal whether the Applicant was arrested under Federal or state law or under which law it was expunged. The Applicant does not intend to use marijuana or any other illegal drug in the future. He no longer associates with the "wrong people" with whom he got into trouble.

In June 1996 the Applicant signed a Questionnaire for National Security Positions (SF-86), or "QNSP," in connection with his application for a security clearance with Employer #1. He disclosed on the QNSP his May 1996 arrest for possession of marijuana, his probation without verdict, and stated that the "entire record [was] to be expunged." He also stated that the marijuana found in his automobile was not his. In February 1997 the Applicant was questioned by a Defense Investigative Service (DIS) agent in connection with the Applicant's application for a personnel security clearance. A sworn statement was signed on that occasion by the Applicant, giving the details of his marijuana experimentation and his prior arrests. In September 1997 the Applicant signed another QNSP, this time in connection with his application for a security clearance with Employer #2. On this QNSP, the Applicant did not mention his employment with Employer #1 and did not disclose the prior U.S. Government background investigation for a security clearance. He also denied on this QNSP any arrest or charge related to drugs (or any other offense) and any use of marijuana since the age of 16.

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:

- (1) the criminal behavior was not recent;

CRITERION E - PERSONAL CONDUCT

Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

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

- (2) the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary

responsibilities;

Conditions that could mitigate security concerns include:

None applicable.

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;

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 draw only 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 Applicant successfully rebutted and overcame the Government's case with regard to Criterion H.

The evidence in the record shows use of marijuana and no other illegal drugs. The frequency of the marijuana use was minimal and ceased about four or five years ago. The Applicant does not currently use marijuana and does not intend to use marijuana or any other illegal drug in the future. The Government questions his credibility when he declared that the marijuana was not his when he was arrested in May 1996, but offers no evidence to contradict his statements. The Applicant's drug abuse (DC #1) is mitigated because his drug involvement was not recent (MC #1) and because he has demonstrated an intent not to abuse any drugs in the future (MC #3). Therefore, SOR ¶ 3 is concluded favorably to the Applicant.

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 E.

The evidence shows arrests on three occasions, two of which occurred when he was a teenager and involved minor infractions. The last arrest involved simple possession charges that were treated lightly under the Applicant's "first offender" status and a shoplifting charge that was withdrawn by the prosecution. Although these "multiple lesser offenses" (DC #2) raise a question as to the Applicant's security clearance eligibility, the question is satisfactorily answered by the fact that the behavior was not recent (MC #1) and his circumstances--and/or lifestyle--have changed since his graduation in June 1996 and his acquisition of a permanent professional position and current social associations. Therefore, SOR ¶ 1.a. is concluded favorably to the Applicant.

However, the Applicant's falsifications of his 1997 QNSP through deliberate concealment not only constitute a Federal felony (SOR ¶ 1.b.),⁽⁴⁾

but also fall within the scope of Criterion E (personal conduct) in SOR ¶ 2. His prior arrest record, prior security investigation, and his prior drug history are all relevant and material facts within the meaning of DC #2, which is identified on page 4 *supra*. He himself had disclosed this information in February 1997 to the very organization that was to investigate his background after the September 1997 QNSP was signed. He argues in his response to the FORM that he was excused from disclosing his May 1996 arrest on the QNSP because the form states (question 23, SF-86 page 7):

The single exception to this requirement [that is, the requirement for disclosure of arrests stricken from the court record] is for certain con-victions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.

However, 21 U.S.C. 844(b) only applies to expungement orders issued prior to November 1987, and 18 U.S.C. 3607(c), dealing with orders for the expungement of simple drug possession arrests, only applies when the offense took place when the offender was less than twenty-one years of age. Furthermore, it is unclear whether the arrest in May 1996 and the expungement order subsequently issued were made under state law or under the Federal Controlled Substances Act. Therefore, the Applicant was not excused from disclosing his arrest in May 1996 on his September 1997 QNSP. While he contends that he was led to "believe" that he was so excused based on private legal advice, such a contention is not credible in the context of the other information he also concealed without adequate justification. It is simply incredible, *e.g.*, that he would have forgotten adverse information that he had disclosed a brief seven months earlier. The Applicant now argues that, to the best of his knowledge, he had not been investigated or approved for a security clearance at the time he filled out the QNSP where he works. Yet, in his DIS statement in February 1997 (FORM item 5, page 1) he initialed the statement printed on the form that reads:

b. PRINCIPAL PURPOSE. This inquiry is being conducted to obtain information which will enable DoD officials to determine if your suitability for access to classified defense information . . . is clearly consistent with the interests of national security

Again, it is incredible that he did not know in September 1997 that he had been recently subjected to a background investigation for a personnel security clearance.

The Directive requires that the factors listed in Section F.3 and enclosure 2 to the Directive, identified on pages 5-6 *supra*, be considered, as appropriate, in making this decision. The nature and seriousness of the Applicant's falsifications cannot be minimized. The recency and the age of the Applicant in September 1997 also weigh heavily against him. This is contrasted with the allegations in SOR ¶ 1.a. and SOR ¶ 3. No judgment is formed as to the likelihood of a recurrence of lying when it counts in the future.

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.: For Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2. Criterion E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Paragraph 3. Criterion H: FOR APPLICANT

Subparagraph 3.a.: 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. Although the Applicant had in his March 7, 1998 response requested a hearing "if" his response did not fully explain his SOR answer, he expressly declined a hearing on March 19, 1998, and declined to provide by April 3, 1998, good cause why a hearing should be scheduled. Therefore, the original waiver of a hearing that was contained in his November 30, 1997 answer to the SOR was accepted.

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. Title 18 U.S. Code, § 1001, provides: "Whoever, in any matter within the jurisdiction of any department or agency of the United States **knowingly and willfully** falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or **makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry**, shall be fined not more than \$10,000 or imprisoned not more than five years, or both." (emphasis added.) Such an offense is classified as a Class D felony in accordance with 18 U.S.C. §3559(a); with regard to the maximum fine authorized, *see* 18 U.S.C. §3571.