

DATE: April 21, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0769

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR GOVERNMENT

William S. Fields, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On November 24, 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 December 4, 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 13, 1998, and received an opportunity to file objections and submit material in refutation, extenuation, or mitigation. The Applicant elected not to respond to the FORM within the requisite 30 days, *i.e.*, on or before February 12, 1998. The record in this case closed on February 12, 1998. The undersigned Administrative Judge received the case assignment on April 9, 1998.

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 24-year-old electrical engineer employed since May 1997 by a U.S. Government contractor. The Applicant seeks to obtain a personnel security clearance.

The Applicant graduated in 1997 after attending a University for five years. He first smoked marijuana in the spring of 1994 until May 1997. During this three year period he used marijuana about five times a month, usually on weekends in social settings when the marijuana was offered to him. He never received any psychological or medical treatment--nor

was he ever arrested or involved in incidents--related to his use of marijuana. He believes that he was never dependent upon marijuana and does not believe that he needs any counseling for his past usage. He never purchased, sold, produced, or trafficked in marijuana. He signed a security clearance application (SF-86) on May 22, 1997. He used marijuana one last time after that but before he was hired by his present employer. He also abused ritalin, a prescription drug, three times a day on school days in the 1995-97 period.

In October 1997 the Applicant signed a sworn statement for a Defense Investigative Service (DIS) agent, in which he stated that he did not plan to use any illegal substance in the future. He is engaged to marry a person who does not tolerate any use of illegal drugs. The Applicant also believes that an illegal drug lifestyle is incompatible with raising a clean and honest family. The Applicant has moved away from the college atmosphere in which marijuana use was tolerated. He had used it because "it was the social thing to do and [he] was around other people who [were] doing it."

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);

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 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. ⁽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 Criterion H.

The evidence is clear that the Applicant abused drugs within the meaning of DC #1, which is identified on page 3 *supra*. On the other hand, he does not plan to use any illegal substances in the future. MC #3 suggests that past drug abuse may be mitigated where such intent is "demonstrated." In the particular facts of this case the Applicant has offered some good reasons why he ought not to use illegal substances. The use of marijuana shortly after he signed a Security Clearance Application (SF-86) last year raises a reasonable inference that he does not think that such "minor" use is relevant to issues of trustworthiness despite the specific questions that address illegal drugs on the SF-86 (questions numbers 27-29). *See* the SOR answer (FORM item 3). The use after signing the SF-86 raises an issue of the Applicant's judgment (if not his self-control). His usage was neither isolated nor limited to the distant past. It occurred in a college social setting at a time when he was not engaged to be married; it occurred at a frequency more extensive than what could fairly be described as merely "experimental use." His last use was at about the time of his college graduation just before he commenced work for his present employer--less than a year ago. The Applicant has not carried his burden of persuasion to successfully mitigate the legitimate security concerns raised by his illegal drug use.

Each clearance decision is required to take into consideration pertinent factors set forth in Section F.3 of the Directive and in the adjudicative process discussion at Enclosure 2 to the Directive. These factors are identified on page 4 *supra*. The drug abuse was not egregious in frequency although it was recent. The Applicant's youth and immaturity at the time it occurred weigh in his favor as does the apparent lack of dependency. The circumstances under which it occurred and the Applicant's motivation in using marijuana have also been considered. The absence of persuasive evidence of "rehabilitation"--in this case evidence of education regarding the potential destructiveness of drug abuse--provides no basis upon which to predict that illegal drug abuse will not recur. The risk of recurrence is too great--based on the meager evidence in the record--for the Federal government to bear. Therefore, SOR ¶ 1 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

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).