

DATE: May 8, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-10846

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Timothy J. Donovan, Esquire, Applicant's counsel

SYNOPSIS

In 1977, 25 years ago, the Applicant pled guilty to two counts of Sale of a Controlled Substance, felonies. He was sentenced to four years in the State prison, which was suspended. He was also fined \$250 and placed on probation for five years, which was to run until 1983. In 1980, however, pursuant to a petition by the State, a State District Court Judge changed the Applicant's prior plea to "Not Guilty," and dismissed the charges against the Applicant. The provisions of 10 U.S.C. 986 apply. Clearance is denied.

STATEMENT OF THE CASE

On November 26, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed the reasons why DOHA could not make the preliminary affirmative finding under the Directive 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 denied or revoked.

Applicant filed an Answer to the SOR on or about December 23, 2002.

The case was received by the undersigned on February 26, 2003. A notice of hearing was issued on March 13, 2003, and the case was heard on April 3, 2003. The Government submitted documentary evidence. Testimony was taken from the Applicant, who called two witnesses to testify on his behalf. The transcript was received on April 18, 2003. The issues raised here are whether the Applicant's past criminal conduct militates against the granting of a security clearance.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The Applicant is 52 years of age, has a master's Degree, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant.

Guideline J - Criminal Conduct

1.a. In December of 1977, the Applicant pled guilty to two counts of Sale of a Controlled Substance, felonies (Government Exhibit (GX) 6, *see also* Transcript (TR) at page 28 lines 25 to page 29 line 22). The underlying conduct to which he pled guilty occurred during the summer of 1977, when the Applicant acted as the "middleman between two buyers and a seller of Marijuana" (GX 3 at page 3). As a result of his guilty plea, the Applicant was sentenced to four years in the State prison, which was suspended, was fined \$250, and placed on probation for five years, which was to run until 1983 (Applicant's Exhibit (AppX) A at page 3). In 1980, pursuant to a petition by the State, a State District Court Judge changed the Applicant's prior plea to "Not Guilty," and dismissed the charges against the Applicant (AppX A at page 4).

The Applicant has held a security clearance since 1982 (TR at page 20 line 14 to page 25 line 2). When he applied for his initial security clearance in 1982, and again when applied for its renewal in 1989, the Applicant divulged the existence of his prior felony conviction (*id*). The Applicant also used marijuana once in 1987, more than 15 years ago (TR at page 23 line 20 to page 24 line 15). He divulged this one time use in preparation for his 1989 renewal application, and intends no future drug usage (*id*).

1.b. The facts admitted by the Applicant in subparagraph 1.a., above, bring this case within the purview of 10 U.S.C. 986, which disqualifies him from having a security clearance granted or renewed by the Department of Defense. In a meritorious case, however, the Secretary of Defense may authorize an exception to this prohibition. In requesting his hearing, the Applicant requested consideration of a waiver (*see* Applicant's Hearing Brief).

Mitigation

In 1989, the Applicant was awarded a Master's Degree in Procurement and Contract Management (TR at page 4 lines 6~10). The Applicant's wife of eight years testified on his behalf (TR at page 33 line 13 to page 37 line 1). They have a "very fulfilling" relationship (*id*). She is "very intolerant of drug use," and feels "very strongly" that her husband will never use drugs again (*ibid*).

A co-worker of the Applicant, who worked in security for 15 years, thinks most highly of the Applicant (TR at page 38 line 8 to page 41 line 15). This sentiment is echoed by his Program Director, and by the Contracts Manager (AppX C at pages 2 and 3). All three are aware of the Applicant's past drug usage.

POLICIES

Enclosure 2 and Section E.2.2. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. The conditions should be followed in every case according to the pertinent criterion, however, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security clearance case presents its own unique facts and circumstances, it should not be assumed that these conditions exhaust the realm of human experience, or apply equally in every case. Conditions most pertinent to evaluation of this case are:

Criminal Conduct

Condition that could raise a security concern:

c. Conviction in a Federal or State court . . . of a crime and sentence to imprisonment for a term exceeding one year;

Condition that could mitigate security concerns:

g. Potentially disqualifying conditions c. and d., above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense . . . has granted a waiver.

As set forth in the Directive, each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

- a. Nature, extent, and seriousness of the conduct, and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age and maturity 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 consequence involved.
- e. Absence or presence of rehabilitation.
- f. Probability that circumstances or conduct will continue or recur in the future."

The Administrative Judge, however, can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence that are speculative or conjectural in nature.

The Government must make out a case under Guideline J (criminal conduct); which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places. If an applicant has demonstrated a lack of respect for the law, there then exists the possibility that an applicant may demonstrate the same attitude towards security rules and regulations.

CONCLUSIONS

The Applicant was convicted for felonious conduct that occurred more than 25 years ago. His sentence of four years, though suspended, and the charge against him ultimately dismissed, brings him within the purview of 10 U.S.C. 986. In the last 15 years, the Applicant has lived an exemplary life. He continued his higher education and received a Master's Degree in 1989, and has had absolutely no other criminal conduct. His wife and those who work with the Applicant speak most highly of his character. However, because his prison sentence exceeded one year, a fact uncontested by the Applicant, under the provisions of 10 U.S.C. 986, Guideline J is found against the Applicant.

Considering all the evidence, the Applicant has not rebutted the Government's case regarding his criminal conduct. The Applicant has thus not met the mitigating conditions of Guideline J, and of Section F.3. of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Guideline J.

FORMAL FINDINGS

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: AGAINST THE APPLICANT

- a. Against the Applicant.
- b. Against the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

DECISION

In light of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant. **I recommend further consideration of this case for a waiver of 10 U.S.C. 986.**

Richard A. Cefola

Administrative Judge