

DATE: January 15, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0675

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esquire, Department Counsel

FOR APPLICANT

Gary C. Byler, Esquire, Applicant's Counsel

STATEMENT OF THE CASE

On July 26, 2001, 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 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 August 27, 2001.

Applicant elected to have this case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) on October 5, 2001. Applicant was instructed to submit objections or information in rebuttal, extenuation or mitigation within 30 days of receipt of the FORM. Applicant received his copy on October 19, 2001, and Applicant's reply was received on or about November 16, 2001. The case was received by the undersigned for resolution on January 2, 2002. The issue raised here is whether the Applicant's admitted 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 File of Relevant Material and Applicant's Response. The Applicant is 44 years of age, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant.

Guideline J - Criminal Conduct

1.a.~1.d and 1.i. In March of 1976, the Applicant was arrested for, and subsequently found guilty of, Disorderly conduct (Item 6 at pages 1~2). Three year later, in **March of 1979**, the Applicant was arrested for, charged with, and subsequently found guilty of Possession of a Controlled Drug (Marijuana) with Intent to Distribute, a **felony**, and of

Possession of a Controlled Drug (Marijuana), a misdemeanor (Item 6 at page 2, and Item 7). As a result of this conviction, the Applicant was sentenced to 5 years in prison, which was suspended (*id*). Three years later, in **September 1982**, the Applicant was arrested for, charged with, and subsequently found guilty of Conspiracy to Commit a Felony, also a **felony** (Item 5 at page 2, Item 6 at pages 2~3, and Item 8). As a result of this second felony conviction, he was again sentenced to 5 years in prison, which was suspended (*id*). Three months later in **December of 1982**, while awaiting trial for the September 1982 arrest, the Applicant was arrested for, charged with, and subsequently found guilty of Receiving Stolen Property, a **felony** (Item 6 at page 3, and Item 9). As a result of this third felony conviction, he was sentenced to 10 years in prison, which was also suspended, but he was placed on probation for 10 years (*id*). Under 10 U.S.C. Section 986, the Applicant is disqualified from having his security clearance granted or renewed as a result of the three felony convictions and sentences of more than one year.

1.e.~1.j. Subsequent to his felony convictions, the Applicant's Criminal Conduct is the following: **December 1984**, Urinating in Public, a misdemeanor, for which he was fined (Item 6 at pages 3~4); **March 1985**, Driving Under the Influence (DUI), for which he was found guilty, fined, and sentenced to 30 days in jail, which was suspended (Item 6 at page 4); **April 1986**, Drinking in Public, for which he was fined (*id*); **April 1987**, Frequenting for Lewdness, a misdemeanor, for which he was fined (Item 6 at pages 4~5); **January 1993**, Lewd and Lascivious Cohabit, for which he was fined (Item 6 at page 5); **May 1994**, Drunk in Public/Profanity-General and Possession of Marijuana, for which he was fined (Item 5 at page 2, and Item 6 at page 5); and **July 1998**, Disorderly Conduct, for which he was fined, sentenced to six months in jail, which was also suspended (Item 6 at pages 5~6).

Mitigation

The Applicant offers a November 1998 Letter of Appreciation (Applicant's Exhibit (AppX 4), and 10 Letters of Reference (AppXs 5~14) on his behalf. The Letters of Reference are from those with whom the Applicant works. They are all laudatory as to the Applicant's work ethic and trustworthiness.

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

Conditions that could raise a security concern:

- a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
- b. A single serious crime or multiple lesser offenses;
- 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:

None.

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 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 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 has a long and fairly recent history of past criminal conduct; and as such, this Decision is made without reference to 10 U.S.C Section 986. This history is evidenced by three felony convictions from 1979~1982, two misdemeanor convictions, one in 1985 and the other in 1998, and an additional five citations from 1984~1994. After his last felony conviction, the Applicant was placed on probation for 10 years. During this 10 year probationary period, the Applicant was cited and fined three times, and also had a misdemeanor conviction for DUI. Although the Applicant's last misdemeanor conviction, for Disorderly Conduct, was more than three years ago, it also can not be viewed in isolation, in light of the Applicant's extensive past criminal record. Despite the laudatory comments of those with whom the Applicant works, his is clearly not a stellar, post felony conviction, record. Rather it calls into question the Applicant's judgement, reliability and trustworthiness. Guideline J is therefore 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.
- c. Against the Applicant.

d. Against the Applicant.

e. Against the Applicant.

f. Against the Applicant.

g. Against the Applicant.

h. Against the Applicant.

i. Against the Applicant.

j. Against the Applicant.

k. Against the Applicant.

l. 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.

Richard A. Cefola

Administrative Judge