

DATE: August 2, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-02407

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The sexual criminal allegations against the Applicant were unfounded; and as such, they were dismissed. However, in 1995 he was cited for and admits to furnishing alcohol to minors. This isolated incident is distant enough in time as not to be of security significance. Clearance is granted.

STATEMENT OF THE CASE

On February 14, 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 March 4, 2002.

The case was received by the undersigned on June 13, 2002. A notice of hearing was issued on June 17, 2002, and the case was heard on July 10, 2002. The Government submitted documentary evidence, eight exhibits. Testimony was taken from the Applicant, who also called a witness to testify on his behalf. The transcript was received on July 18, 2002. The issues raised here are whether the Applicant's alleged criminal conduct, and related sexual and personal 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 46 years of age, has two Associate Degrees, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant.

Guideline J - Criminal Conduct, Guideline D - Sexual Behavior & Guideline E - Personal Conduct

1.a.~1.d., 2.a. and 3.a. In October of 1996, the Applicant was charged with three counts of Rape of a Child in the First Degree (Government Exhibit (GX) 4 at pages 1~2). These allegations arose from two separate incidents. In 1993, the Applicant was playing with two neighborhood children (Transcript (TR) at page 29 line 9 to page 32 line 25, and at page 41 line 19 to page 46 line 2). One of the children brought a toy magic wand into the play (*id*). It fell onto the lap of this child, and she later told her parents that the Applicant touched her with his magic wand, "a pink stick," (*ibid*). The parents assumed the worse case scenario, and called the authorities.

In late 1994 and early 1995, the Applicant was again playing with his tenant's child (TR at page 33 line 23 to page 35 line 23). The mother of this child, a single mother with little means of support, had heard that the parents of the child noted above received monies from a Crime Victims Fund (*id*). She soon thereafter went to the authorities and caused two charges to be alleged against the Applicant (*ibid*). These two charges, and that noted in the prior paragraph, were subsequently **dismissed with prejudice** (GX 4 at pages 7~8). The Applicant has always espoused his innocence.

1.e. and 3.b. Later, in 1995, the Applicant was maintaining his tenancy with the help of neighborhood teenagers (TR at page 35 line 24 to page 38 line 16, and at page 50 lines 10~25). Three of these teenagers were the grandchildren of a new tenant, who replaced the single mother tenant who caused the false allegations to be charged (*id*). In exchange for their help, he offered the teenagers "some pizza and soda," but they talked the Applicant into providing them with a six pack of beer (*ibid*). One of the teenager's father complained to the authorities; and as a result, the Applicant was cited for Furnishing Alcohol to inors (GX 5). He was fined \$150 (*id*).

Mitigation

The grandmother of three of the before mentioned teenagers has written a letter in support of the Applicant's request for a security clearance (Applicant's Exhibit A). The Applicant's supervisor testified that the Applicant is both truthful and trustworthy (TR at page 53 line 17 to page 56 line 20).

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:

1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;

Conditions that could mitigate security concerns:

1. The criminal behavior was not recent;
2. The crime was an isolated incident;

Sexual Behavior

Conditions that could raise a security concern:

None

Personal Conduct

Conditions that could raise a security concern:

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 Guidelines J (criminal conduct), D (sexual behavior), and E (personal 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 vehemently denies the allegations of sexual misconduct. I find his denial to be credible, as the charges against him were dismissed with prejudice, and his supervisor corroborates that the Applicant is a truthful person. He was, however, cited for Furnishing Alcohol to Minors, an allegation he unequivocally admits. This isolated incident occurred nearly seven years ago; and as such, is not of present security significance. Guidelines D, E and J are therefore found for the Applicant.

Considering all the evidence, the Applicant has rebutted the Government's case regarding his criminal conduct, and his alleged sexual behavior and personal conduct. The Applicant has thus met the mitigating conditions of Guidelines D, E and J, and of Section F.3. of the Directive. Accordingly, he has met his ultimate burden of persuasion under Guidelines D, E and J.

FORMAL FINDINGS

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

Paragraph 1: FOR THE APPLICANT

- a. For the Applicant.
- b. For the Applicant.
- c. For the Applicant.
- d. For the Applicant.
- e. For the Applicant.

Paragraph 2: FOR THE APPLICANT

- a. For the Applicant.

Paragraph 3: FOR THE APPLICANT

- a. For the Applicant.
- b. For 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 clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Richard A. Cefola

Administrative Judge