

DATE: November 26, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-17835

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1995, the Applicant pled guilty to a third degree felony, for conduct that occurred during 1992~1993. He was sentenced to an indeterminate prison term of zero to five years, of which he served 90 days in jail. The provisions of 10 U.S.C. 986 apply. Clearance is denied.

STATEMENT OF THE CASE

On June 7, 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 August 10, 2002.

The case was received by the undersigned on October 7, 2002. A notice of hearing was issued on October 16, 2002, and the case was heard on October 31, 2002. The Government submitted documentary evidence, and called one witness to testify. Testimony was taken from the Applicant, who called two witnesses to testify in his behalf. The transcript was received on November 7, 2002. 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 50 years of age, and is employed as an "electronic mechanic" by a defense contractor who seeks a security clearance on behalf of the Applicant.

Guideline J - Criminal Conduct

1.a. In September of 1995, the Applicant pled guilty to "attempted forcible sexual abuse, a 3rd degree felony" (Government Exhibit (GX) 5 at page 16). The underlying conduct to which he pled guilty occurred during the 1992~1993 time frame, and involved his, then 15 to 16 year old daughter (Transcript (TR) at page 17 lines 9~23). As a result of his guilty plea, the Applicant was "ordered to spend an indeterminate term of 0-5 years in the . . . State prison. . . [He was] fined \$5,000.00. The prison term and fines . . . [to be] suspended upon successful completion of 36 months probation. . . [He was] ordered to spend 90 days in . . . [the] County Jail" (GX 5 at page 30). The Applicant did, in fact, spend 90 days in jail, successfully completed a very comprehensive "sex offender program," and his probationary period ended in October of 1998 (TR at page 20 lines 2~7, at page 21 lines 8~25, and at page 40 lines 3~8). The Applicant has engaged in no subsequent criminal conduct (TR at page 22 lines 23~25).

1.b. The facts admitted by the Applicant in subparagraph 1.a., above, brings this case with 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 authorized an exception to this prohibition. In requesting his hearing, the Applicant requested "consideration of a waiver" (Applicant's answer at page 1).

Mitigation

The Applicant's current wife, of two years, has "a 18-year-old daughter and [a] 9-year-old daughter" from a previous marriage, who also reside with the Applicant (TR at page 39 lines 11~13). The witness has no qualms about her daughters living with the Applicant (TR at page 39 lines 7~9, *see also* Applicant's Exhibit (AppX) A at page 1).

The Applicant's mother also testified on behalf of her son. She avers that he "can be trusted with girls" (TR at page 43 line 2, *see also* AppX A at page 2). Through written declarations, the Applicant's family and friends further aver to his honesty and trustworthiness (AppX A at pages 2~9). Of particular note are the declarations of his step daughter-in-law and her husband. She avers, in part, "I only wished I had been blessed with him as my father growing up" (AppX A at page 3). Her husband avers, in part, "[h]e is a good example for me, a wonderful grandfather to my children, and a good citizen for our country" (AppX A at page 4).

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 about ten years ago. His sentence of zero to five years, though an indeterminate one, brings him within the purview of 10 U.S.C. 986. Since his conviction, the Applicant has made great strides in his rehabilitation. Subsequent to spending 90 days in jail, he has successfully completed a sex offender program, and a probationary period of 36 months. He has had absolutely no other criminal conduct in the last decade, and his friends and family speak most highly of his character. However, because his indeterminate prison term arguably 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