

DATE: February 28, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-17917

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant was found guilty of two felonies for drug offenses committed in 1997. He was sentenced to four to five years in prison, which was suspended. The provisions of 10 U.S.C. 986 apply. Clearance is denied.

STATEMENT OF THE CASE

On April 17, 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 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 May 23, 2002.

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 November 19, 2002. 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 December 20, 2002, and submitted nothing in reply. The case was received by the undersigned for resolution on January 24, 2002. The issue raised here is 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, and the File of Relevant Material. The Applicant is 46 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. In April of 1976, the Applicant was found guilty of two felonies, Transportation of Marijuana, and Possession of Marijuana for Sale (Government Exhibits (GXs) 4, 6 and 7). The underlying conduct for which he was found guilty occurred in November of 1975, when the Applicant was 19 years of age (GX 7 at page 1). He knowingly drove a car across the U.S./Mexican border with marijuana in its trunk (*id*). He explains, "I knew there would be Marijuana in the car trunk, and that it would be illegal, but I thought I would not get caught, and I did need the money" (*ibid*). As a result of his conviction, the Applicant was sentenced, in part, to four to five years in prison, all suspended (GX 4).

1.b. The facts admitted by the Applicant in subparagraph 1.a., above, brings 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 authorized an exception to this prohibition (GX 5).

Mitigation

In his sworn statement, he Applicant avers he "was young," but offers little else in the way of mitigation.

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 ConductCondition 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;

Conditions 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, 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 two felonious that occurred about 27 years ago. He was sentenced to four to five years in prison, which was suspended, but this sentence brings him within the purview of 10 U.S.C. 986, which does not cite the age of the conviction as a factor to be weighed. Pursuant to the provisions of the federal statute, 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 E.2.2. 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 do not recommend further consideration of this case for a waiver of 10 U.S.C. 986.

Richard A. Cefola

Administrative Judge