

DATE: April 22, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-19071

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant was less than candid when he answered question 21 on his December 1999 Security Clearance Application (SCA). He answered "No" as to "Felony Offenses," when, in fact, he was charged with felony offenses in 1972, 1974, 1978 and 1985. He was also convicted of felonies and sentenced to more than a year of imprisonment in 1977, 1979 and 1985. He was also less than candid when he answered question 22 on his December 1999 SCA. He answered "No" as to "Firearms Offenses," when, in fact, he was charged with firearms offenses in 1979, 1980 and 1985. The Applicant's fairly recent falsifications, coupled with his three prior felony convictions, are clearly of present security significance. Clearance is denied.

STATEMENT OF THE CASE

On August 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 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 September 17, 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 January 30, 2003. 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 February 13, 2003, and Applicant's reply was received on March 10, 2003. The case was received by the undersigned for resolution on March 21, 2003. The issues raised here are whether the Applicant's past criminal conduct and related personal conduct militate 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 49 years of age, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant.

Guideline J - Criminal Conduct & Guideline E - Personal Conduct

1.a., 1.g., 1.h. and 1.k. In October of 1971, the Applicant was arrested for, and subsequently charged with, Burglary (Government Exhibit (GX) 10 at page 2). In August of 1979, he was arrested for, and subsequently charged with, Assault with a Deadly Weapon; and in August of 1980, the Applicant was arrested for, and subsequently charged with, Probation Violation (GX 10 at page 5). Finally, in December of 1985, he was arrested for, and subsequently charged with, Possession of Burglary Tools and Prowling (GXs 7 and 8, GX 10 at pages 6~9, GX 11 at pages 1~2, and GX 12 at page 2).

1.b.~1.f, 1.j., 1.l. and 2.a. In July of 1972, the Applicant was charged with, and subsequently found guilty of, Burglary, a **felony** (GX 10 at page 2). In February of 1974, he was charged with another Burglary, also a **felony** (GX 10 at page 2). In February of 1975, the Applicant charged with, and found guilty of, **two felony counts** of Burglary (GX 10 at page 3, and at GX 12 at pages 1~2). As a result of this conviction, he was sentenced to five years to life in prison (*id*). The Applicant was paroled in December of 1977 (*ibid*). In May of 1978, five months after getting out of prison, the Applicant was charged with yet another Burglary, also a **felony** (GX 10 at page 4).

In July of 1979, the Applicant was charged, in part, with, and found guilty of, Robbery, a **felony** (GX 10 at page 4, GX 11 at page 1, and GX 12 at page 2). As a result of this conviction, he was sentenced to five years and four months in prison (*id*). In November of 1985, the Applicant was arrested, in part, for, and subsequently charged with, the Possession of a Firearm with a Prior Felony Conviction, a **felony**, and also with Brandishing a Firearm, another **felony** (GX 6, GX 10 at pages 5~6, and GX 10 at pages 3~4). Finally, in December of 1985, the Applicant was, in part, charged with, and subsequently found guilty of, Robbery in an Inhabited Dwelling, **two felony counts** (GXs 7 and 8, GX 10 at pages 6~9, GX 11 at pages 1~2, and GX 12 at page 2). As a result of this last conviction, he was sentenced to 19 years in prison (*id*).

In answering question 21 on his December 1999 SCA, the Applicant knowingly and wilfully failed to disclose any of his past felony charges or felony convictions (GX 9 at page 5). This wilful falsification is a violation of 18 U.S.C. Section 1001.

1.f., 1.i., 1.j. and 2.b. In July of 1979, the Applicant was charged, in part, with, and found guilty of, Possession of a **Firearm** by an Ex-Felon (GX 10 at page 4, GX 11 at page 1, and GX 12 at page 2). In November of 1980, he was arrested for, and subsequently charged with Robbery with Use of **Firearm**. Finally, in November of 1985, the Applicant was arrested, in part, for, and subsequently charged with, the Possession of a **Firearm** with a Prior Felony Conviction, and with Brandishing a **Firearm** (GX 6, GX 10 at pages 5~6, and GX 10 at pages 3~4).

In answering question 22 on his December 1999 SCA, the Applicant again knowingly and wilfully failed to disclose any of his past firearm charges or firearm convictions (GX 9 at page 5). This wilful falsification is also a violation of 18 U.S.C. Section 1001. Guideline E is found against the Applicant.

As there is a clear pattern of criminal conduct, culminating with his fairly recent falsification, Guideline J is also found against the Applicant. Furthermore, as Guidelines E and J are both found against the Applicant without reference to his felony prison terms, the waiver provision of 10 U.S.C. 986 is therefore moot.

Mitigation

The Applicant offers little in the way of mitigation, but avers that his falsifications were not deliberate.

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:

- (2) A single serious crime or multiple lesser offenses;
- (3) 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.

Personal Conduct

Conditions that could raise a security concern:

- (2) The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . . or similar form . . . ;

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 which is speculative or conjectural in nature.

The Government must make out its case under Guideline E (personal conduct) and 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.

Personal conduct is conduct involving questionable judgement, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations; and improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. 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 in his private affairs, there then exists the possibility that an applicant may demonstrate the same attitude towards security rules and regulations.

CONCLUSIONS

The Applicant was less than candid in answering questions 21 and 22 on his December 1999 SCA. In addition, there is absolutely no evidence that the Applicant came forward with the truth as to his past felony or firearm charges and convictions, until he was confronted with the falsehoods sometime later. The Applicant's lack of candor, coupled with the fact that he has three felony convictions, are thus clearly of security significance; and as such, Guidelines E and J are found against the Applicant. As this denial is not solely based on 10 U.S.C. 986, its waiver provision has been mooted.

Considering all the evidence, the Applicant has not rebutted the Government's case regarding his criminal conduct, and his related personal conduct. The Applicant has thus not met the mitigating conditions of Guidelines E and J, and of Section E.2.2. of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Guideline E and 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.
- m. Against the Applicant.

n. Against the Applicant.

Paragraph 2: 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.

Richard A. Cefola

Administrative Judge