

DATE: March 26, 2003

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 01-26084

**DECISION OF ADMINISTRATIVE JUDGE**

**RICHARD A. CEFOLA**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Beginning in 1980, the Applicant has been arrested on four separate occasions, resulting in three convictions. His most recent conviction was in 1997, for Tampering with Evidence, a felony. When he and a friend were confronted by the police at his friend's home, he attempted to flush the friend's cocaine down a toilet. In his late 20s, the Applicant was also a member of the American Communist Party. In light of the Applicant's fairly recent history of criminal conduct, his clearance is denied.

On October 8, 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 October 29, 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 23, 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 January 29, 2003, and submitted nothing in reply. The case was received by the undersigned for resolution on March 6, 2003. The issues raised here are whether the Applicant's repeated criminal conduct and alleged personal conduct militate against the granting of a security clearance on behalf of the Applicant.

**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 40 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. In **1980**, the Applicant was arrested and charged with Public Drunkenness (Government Exhibit (GX) 6 at page 5). The Applicant explains the circumstances of this arrest in the following terms: "on the evening of my graduation from high school . . . , I was arrested for public drunkenness and spent a night in the drunk tank. I was 17 years old at the time" (*id*). Three years later, in **September of 1983**, the Applicant was arrested for, and subsequently convicted of, Possession of Marijuana and Driving While Intoxicated (GX 11). The Applicant states the following:

I was stopped by police for a broken tail light. I had just left a keg party and was extremely intoxicated. The officer smelled the alcohol on me, arrested me for Driving While Intoxicated. I was 21 years old. During the arrest the officer searched my car and found a small bag of marijuana. It was my marijuana (GX 6 at pages 4~5).

In **May of 1993**, the Applicant was arrested for, and subsequently convicted of, Assault (GX 6 at page 4, and GXs 9 and 10). The Appellant avers that he had a 2:00 a.m. confrontation with a drunken former acquaintance at his front door (GX 6 at page 4). "I finally popped her on the lips through the screen, with my fist, one time" (*id*). The victim and a witness, however, claim "he hit her in the face with the side of his pistol he was holding" (GX 9 at page 2). The Applicant was fined and performed community service (GX 10). More recently, in **January of 1997**, he was arrested and ultimately pled guilty to Tampering with Evidence, a felony (GX 7 and GX 8 at page 2). The Applicant admits to the following circumstances:

About five minutes after I arrived at Robert's home the police began banging in the door. Robert handed me a packet and said something like "Quick, flush this." Without thought I ran to the bathroom and began trying to flush small paper packages down the toilet. The packets contained cocaine (GX 6 at page 2).

In part, the Applicant was placed on 18 months probation as a result of this conviction (GX 8 at page 2).

## Guideline E - Personal Conduct

2.a. The Applicant was a member of the American Communist Party from January of 1989 to June of 1990, when he was in his late 20s (GX 3).

2.b. In January of 1997, the Applicant attempted to flush packets of cocaine down a toilet, in an attempt to avoid discovery by the police (GX 6 at page 2).

## Mitigation

The Applicant offers little 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 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;

Condition that could mitigate security concerns:

None.

Condition that could raise a security concern:

a. Reliable, unfavorable information . . . ;

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, 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 is speculative or conjectural in nature.

The Government must make out a case under Guideline J (criminal conduct) and Guideline 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 has a long and fairly recent history of criminal conduct. This history is evidenced by four arrests and three convictions from 1980~1997. In 1993 he assaulted a drunken female, by some accounts with the side of a pistol. His most recent conviction is even more troubling as he demonstrated his willingness, on the spur of the moment, to thwart the attempts of law enforcement. Furthermore, the Applicant offers absolutely nothing to demonstrate he has been successfully rehabilitated, as required by the last mitigating condition under criminal conduct. Instead, his past actions call into question the Applicant's judgement, reliability and trustworthiness. Guideline J and subparagraph 2.b.

under Guideline E are therefore found against the Applicant.

As to the Applicant belonging to a questionable political party more than 12 years ago, without some evidence as to its political agenda, I can not find that past membership is of present security significance. Subparagraph 2.a. is therefore found for the Applicant.

Considering all the evidence, the Applicant has not rebutted the Government's case regarding his criminal conduct and personal conduct. The Applicant has thus not met the mitigating conditions of Guidelines E and J, and of Section F.3. of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Guidelines 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.

#### Paragraph 2: AGAINST THE APPLICANT

- a. For 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