

DATE: June 24, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-26904

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant now admits that he committed a lewd act in public in November of 1996. However, he was less than candid about this lewd act on his August 1999 Security Clearance Application (SCA), in his subsequent August 2000 sworn statement, and again during a November 2000 interview. He was also less than candid about his past due indebtedness on his SCA, and again in his subsequent sworn statement. These repeated wilful falsifications are violations of 18 U.S.C. Section 1001. His repeated lack of candor as to his lewd conduct also demonstrates that the Applicant is susceptible to possible coercion. Clearance is denied.

STATEMENT OF THE CASE

On August 23, 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 or about November 21, 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 April 16, 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 April 26, 2003, and submitted nothing in reply. The case was received by the undersigned for resolution on May 28, 2003. The issues raised here are whether the Applicant's sexual behavior, personal conduct, and related criminal conduct militate against the granting of a security clearance. [The Applicant admits all of the allegations.]

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 34 years of age, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact.

Sexual Behavior

2.a. and 2.b. The Applicant committed a lewd act in a public park in November of 1996 (Government Exhibit (GX) 5 at page 2). He "lied about . . . [his] involvement because of . . . [his] extreme embarrassment" (*id*).

Guideline E - Personal Conduct & Guideline J - Criminal Conduct

1.a. In answering question 23 on his August 1999 SCA, the Applicant knowingly and wilfully failed to disclose the underlying basis for his pending charges when he executed the document (GX 4 at pages 8~9, and GX 5 at page 2). He claimed innocence based on mistaken identity, when, in fact, he committed the lewd public act (*id*).

1.b. In executing a signed sworn statement in August of 2000, the Applicant again knowingly and wilfully failed to disclose that he had committed the lewd public act (GX 6 at page 3, and GX 5 at page 2).

1.c. During a interview conducted by a Special Agent of the Defense Security Service (DSS), the Applicant for a third time knowingly and wilfully failed to disclose that he had committed the lewd public act (GX 5 at page 2).

1.d. In answering question 38 on his August 1999 SCA, the Applicant knowingly and wilfully failed to disclose his past due indebtedness in excess of \$5,800 (GX 4 at page 11, and GX 10). He also claimed to be repaying a student loan; when in truth and in fact, he had defaulted on his student loan (*id*).

1.e. He repeated the falsehood as to his past due indebtedness in his subsequent sworn statement (GX 6 at page 2, and GX 10).

3. The Applicant's repeated falsifications, noted above, are violations of 18 U.S.C. Section 1001.

Mitigation

The Applicant offers little, if anything, 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:

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 . . . ;
- (3) Deliberately providing false or misleading information concerning relevant and material matter to an investigator . . .
- (4) Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress . . .

Conditions that could mitigate security concerns:

None.

Sexual Behavior

Conditions that could raise a security concern:

- (3) Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;
- (4) Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

Condition that could mitigate security concerns:

- (2) The behavior was not recent and there is no evidence of subsequent conduct of a similar nature;

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.

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 D (sexual behavior), 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 23 and 38 on his August 1999 SCA. He was also less than candid in an August 2000 sworn statement, and during a November 2000 interview. In addition, there is absolutely no evidence that the Applicant came forward with the truth as to his lewd conduct or his past due indebtedness, until he was confronted with the falsehoods sometime later. The Applicant's repeated lack of candor, violations of 18 U.S.C. Section 1001, coupled with the fact that he suffered "extreme embarrassment;" and as such, is susceptible to possible coercion, exploitation or duress, are clearly of security significance. Therefore Guidelines D, E and J are found against the Applicant.

Considering all the evidence, the Applicant has not rebutted the Government's case regarding his sexual behavior, personal conduct, and his related criminal conduct. The Applicant has thus not met the mitigating conditions of Guidelines D, E and J, and of Section E.2.2. of the Directive. Accordingly, he has not 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: AGAINST THE APPLICANT

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

Paragraph 2: AGAINST THE APPLICANT

- a. Against the Applicant.
- b. Against the Applicant.

Paragraph 3: AGAINST THE APPLICANT

- a. 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