

DATE: May 8, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-03996

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1967, 35 years ago, the Applicant, then only 17 years of age, was arrested for, and subsequently pled guilty to, Assault with Intent to Kill with Malice, and Attempted Robbery in the First Degree with a Dangerous and Deadly Weapon, both felonies. He was sentenced to "3 1/3" years of incarceration in an "Intermediate Reformatory for Young Men," of which he spent only six months incarceration after his conviction. The provisions of 10 U.S.C. 986 apply. Clearance is denied. I recommend further consideration of this case for a waiver of 10 U.S.C. 986.

STATEMENT OF THE CASE

On December 20, 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 January 24, 2003.

The case was received by the undersigned on February 11, 2003. A notice of hearing was issued on February 28, 2003, and the case was heard on March 28, 2003. The Government submitted documentary evidence. Testimony was taken from the Applicant. The transcript was received on April 11, 2003. The issues raised here are whether the Applicant's past criminal conduct militates against the granting of a security clearance. [The Applicant admits the substance of the allegation as to the criminal conduct.]

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 52 years of age, attended two years of college, 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 1968, the Applicant pled guilty to Assault with Intent to Kill with Malice, and to Attempted Robbery in the First Degree with a Dangerous and Deadly Weapon, both felonies (Government Exhibit (GX) 4, *see also* Transcript (TR) at page 15 line 17 to page 16 line 1). The underlying conduct, to which he pled guilty, occurred five months earlier in 1967, when he and an accomplice tried to rob another individual by brandishing an ice pick (GX 5 at page 2). The victim attempted to draw his pistol, and was stabbed in the scuffle that ensued (*id*). As a result of his plea, the Applicant was sentenced to "3 1/3" years in an "Intermediate Reformatory for Young Men" (TR at page 14 lines 2~12, and GX 4). He, in fact, served only six months in the youth facility before his release (TR at page 14 lines 13~24).

The Applicant has held a security clearance since 1985, and has never had a security clearance violation (TR at page 12 line 25 to page 13 line 2, and GX 2 at page 9). The Applicant also had a "Drunk Driving" conviction in 1991, but no longer consumes alcohol (TR at page 18 line 24 to page 19 line 10, and GX 2 at page 7). He most recently divulged his felony conviction on his May 1999 renewal application (GX 2 at page 6).

1.b. The facts admitted by the Applicant in subparagraph 1.a., above, bring 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 authorize an exception to this prohibition. In requesting his hearing, the Applicant requested consideration of a waiver (*see* TR at page 12 line 25 to page 13 line 7).

Mitigation

The Applicant has been married for more than 20 years, has two children, belongs to two fraternal organizations, and attends church (TR at page 16 lines 17~22, at page 17 lines 21~24, and at page 19 lines 16~20).

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 35 years ago. His sentence of three and a third years of incarceration, of which he only spent six months in a Reformatory for Young Men, brings him within the purview of 10 U.S.C. 986. In the last 12 years, the Applicant has lived an exemplary life. He has a stable marriage, two grown children, belongs to fraternal organizations, and goes to church. However, because his incarceration sentence exceeded one year, a fact uncontested by the Applicant, the third disqualifying condition is applicable; and as such, 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