

DATE: February 12, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-18345

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant did not intentionally falsify his answer to question 21 on his December 2000 Security Clearance Application (SCA). Relying on the advice provided him by both a district attorney and a judge, he failed to divulge the requested information. In 1999, he had been charged with both Rape and Sodomy, but these charges had been dismissed due to insufficient evidence. The charges arose out of an error in his judgment by which he took nude photographs of his, then, girlfriend, without her consent. Although the taking of the photos is, arguably, a rule violation, it clearly does not demonstrate a "pattern," and as such, is not of present security significance. Clearance is granted.

STATEMENT OF THE CASE

On August 27, 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 September 23, 2002.

The case was received by the undersigned on November 14, 2002. A notice of hearing was issued on November 26, 2002, and the case was heard on January 7, 2003. The Government submitted documentary evidence. Testimony was taken from the Applicant, who also submitted documentary evidence. The transcript was received on January 15, 2003. The issues raised here are whether the Applicant's personal 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, the documents and the live testimony. The

Applicant is 27 years of age, has a Bachelor of Science degree in electrical engineering, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant.

Guideline E - Personal Conduct

1.a. and 1.b. In November of 1999, the Applicant was charged with Rape and Sodomy, both felonies (Government Exhibit (GX) 2 at page 2). These charges arose out of an incident by which the Applicant took nude photographs of his, then, girlfriend without her consent (Transcript (TR) at page 32 line 23 to page 33 line 13). As is alleged in the SOR, the charges were subsequently dismissed due to insufficient evidence (No Bill) (TR at page 38 lines 12~19). (His former girlfriend, in fact, worked with the Applicant for an additional two and a half months on their "senior project" (TR at page 37 lines 1~18), and sent him a congratulatory e-mail upon his graduation (TR at page 9 at line 17 to page 10 line 3, and Applicant's Exhibit (AppX) A)). In his conversations with both the district attorney and the judge, the Applicant got the distinct impression that he could treat the charges as if they had never happened (TR at page 27 lines 13~25, and at page 40 line 12 to page 41 line 9).

In answering question 21 on his December 2000 SCA, the Applicant answered "no," that he had never been charged with a felony (GX 1 at pages 5~6). The Applicant testified credibly, as evidenced by his forthright demeanor and consistency, that it was not his intention to keep information from the Government; and were it not for the conversations he had with the judge and the district attorney, he would have answered "yes" to the posited question (TR at page 22 line 17 to page 23 line 13, and at page 41 line 10 to page 9).

Mitigation

Those who work with the Applicant think highly of him and would recommend him for a position of trust (AppX B at pages 2~6). He also offered his most recent job performance appraisal, which shows he is doing well at his job (AppX at pages 7~8).

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:

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); 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. 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.

CONCLUSIONS

When the Applicant answered question 21 on his December 2000 SCA, he answered it truthfully and to the best of his ability. He relied upon the strong impression made on him by a district attorney and a judge that, as the false charges were dismissed, he should treat them as if they never occurred and get on with his life. He certainly exercised poor judgement in taking nude photographs of his former girlfriend, a mistake the Applicant readily admits, but this one event does not rise to level of "[a] **pattern** of . . . rule violations," as required by the fifth disqualifying condition under Guideline E (emphasis supplied). Guideline E is therefore found for the Applicant.

Considering all the evidence, the Applicant has rebutted the Government's case regarding his alleged personal conduct. The Applicant has thus met the mitigating conditions of Guideline E, and of Section E.2.2. of the Directive. Accordingly, he has met his ultimate burden of persuasion under Guideline E.

FORMAL FINDINGS

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: FOR THE APPLICANT

- a. For the Applicant.
- b. For 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 clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Richard A. Cefola

Administrative Judge