

May 15, 1997

In RE:

SSN:

Applicant for security clearance

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ISCR Case No. 96-0646

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

Appearances

FOR THE GOVERNMENT

Melvin A. Howry

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF CASE

On September 11, 1996, 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 interests of national security 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.

The SOR is attached.

Applicant filed an Answer to the SOR on November 6, 1996.

The case was received by the undersigned on February 10, 1997. This case was originally set to be heard on February 19, 1997; but for good cause shown, it was continued to and heard on April 17, 1997. The Government submitted documentary evidence, and called one witness to testify. Testimony was taken from the Applicant, who also submitted

documentary evidence. The transcript was received on April 25, 1997. The issues raised here are whether the Applicant's alleged criminal conduct and related drug involvement 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 documents and the live testimony. The Applicant is 50 years of age, has a Bachelor of Science Degree in Engineering, and is employed by a defense contractor as a Senior Test Specialist. He currently holds a secret security clearance, and his employer seeks retention of this level clearance on behalf of the Applicant.

Criterion J - Criminal conduct & Criterion H - Drug involvement

1.a. The Applicant was **arrested** in September of 1987 for Resisting, a misdemeanor (Government Exhibit (GX) 3). The Applicant testified credibly that he had just returned from a soccer game which he had refereed. A rather loud and boisterous party had been going on in his neighborhood, and the Applicant was about to join it. He was carrying a bottle of wine to the party site when he was approached by police officers. He did not comply with their request to place the bottle on the ground; and as a result, was arrested (Transcript (Tr) page 64 at line 16 to page 65 line 16, and page 103 line 20 to page 104 line 9). In his arrest report, the arresting officer stated:

The neighbors were very hostile towards law enforcement and were yelling and screaming at the other deputies and myself, that we didn't have any reason to talk to the suspect. To avoid an explosive situation, at that time I placed . . . [the Applicant] into custody . . . (GX 3 at page 2).

The Applicant was "not booked under [a] stipulation of probable cause," and was subsequently released without any further disposition (GX 3 at page 3).

1.b.~1.e. The Applicant was investigated in November of 1989 for allegedly making Annoying Phone Calls (GX 4), in October of 1991 for allegedly making Threats (GX 5 at the last page), in September of 1992 allegedly for a Battery (GX 6), and in January of 1993 for allegedly making Threatening Phone Calls (GX 7). **None** of these investigations **led to any charges being filed** against the Applicant. The Applicant testified credibly throughout the hearing that these allegations stemmed from his dealing with problem neighbors and with a problem son who was, and still is, a drug abuser (*see* Tr page 74 lines 12~21, page 75 line 9 to page 76 line 13, page 77 lines 20~25, page 81 line 18 to page 83 line 9, page 84 lines 4~8, page 105 lines 4~21, page 106 lines 8~14, page 107 lines 13~18, and page 108 lines 12~22).

1.f. The Applicant was charged in May of 1994 with four counts of "Drawing, exhibiting, or using [a] firearm or deadly weapon," a misdemeanor (GX 8 at the last page). The Applicant testified credibly that the four count charge stemmed from an incident with his problem neighbors:

They [neighbors] came down to the house, blocked the driveway, and I thought it started to get out of hand. I told my son to go get the shot gun because I thought there was going to be a big problem and there was more than four, there was six people there at the time. I really didn't want him to get the shot gun, I just thought that would cause them to leave and it didn't.

He [son] left and went into the house. My daughter was out there and I told -- things got calmed down. I told my daughter to tell him, to tell . . . [my son] not to bring it out. Not to do that. Because I really didn't think that he would.

Anyway he [son] came to the garage door and ratcheted it. It was -- the gun was empty. He never pointed it at anyone. It was in the -- he pointed it up in the air, he ratcheted it. And I told him to take it back in the house and that was that. And the rest is history (Tr at page 110 lines 3~19).

Pursuant to a plea bargain, the case was **dismissed**.

1.g., 2.a.~c., and 2.e. The Applicant was arrested in March of 1995, and subsequently **pled nolo contendere** to Receiving Stolen Property (two counts), a felony; Possession of a Controlled Substance (Methamphetamine) for sale, a felony; Concealed Firearm in Vehicle, a misdemeanor; and Carrying a Loaded Firearm on One's Person in the City, a

misdemeanor (GX 11). The Applicant testified credibly that, on the date of his arrest, he had gone to a public storage area to help his son move some items. He had not seen his soccer referee bag for some time, but spotted it in his son's truck:

So, I walked past the truck that he had and I saw the referee bag in it and was curious as to why it was there. And I picked it out and inside were a bunch of small glass viles. Two had a powder in it, and as I mentioned before, my son has had a drug problem on and off since he was 16 years old. I thought it was cocaine.

I took the two viles with the powder out, put them in my pocket, I zipped it back up, threw it in my truck and locked it (Tr at page 98 lines 10~19).

The Applicant continued that:

I went in to confront my son and the Manager from the storage thing was in there. . . . My son walked out and went and got a coke and he came back and I confronted him. And we had just talked a couple of minutes and I heard a dog barking outside and we thought that was odd. And I looked . . . out the door and there was (*sic*) seven or eight policeman.

And apparently the Manager had been called because a lock had been cut. And he either suspected that we did it or suspected whoever did it was still there. And we were detained . . . and asked if they could search my car. And I said, yes they could search my car. And I unlocked it for them.

There was a 9 millimeter Smith and Wesson under the seat and so they arrested me. They patted me down and found the drugs (Tr at page 113 line 17 to page 114 line 9).

The Applicant finished this testimony by stating that:

The officers called the narcotics people and they came out. . . . They asked me if I sold narcotics and I said no. They asked me how much speed I used, [and] because I didn't know whether it was speed, cocaine, or what. . . . I told them three or four times a day. They asked how much and I says (*sic*) a gram. And I don't remember specifically what else they asked. I did tell them it was mine.

And I guess one of the big reasons was I felt guilty about my son. My son was on probation and he still doing weekends. And I figured he was on probation for two years, he would do two years in prison if he was convicted of it (Tr at page 119 lines 4~16, *see also* Applicant's Exhibit (AppX) F).

2.d. The Applicant used marijuana on two occasions while stationed in Viet Nam with the U.S. Army in July of 1967 (Tr at page 100 lines 6~16).

Mitigation

The Applicant offers much in the way of mitigation. There are statements both from his wife and from his son which support his above rendition of what occurred (AppXs A and F). He also offers numerous statements in support of his character and credibility (AppXs B, D, E, G~I, and AppX M items 9 and 13). Furthermore, the Applicant has moved away from his problem neighbors (Tr at page 129 lines 9~23).

POLICIES

Enclosure 2 and Section F.3. 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:

- (1) any criminal conduct . . .
- (2) a single serious crime . . .

Conditions that could mitigate security concerns:

- (1) the criminal behavior was not recent;
- (3) the person was pressured . . . into committing the act and those pressures are no longer present in that person's life;
- (4) . . . the factors leading to the violation are not likely to recur.

Drug involvement

Conditions that could raise a security concern:

- (1) any drug abuse (drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction);
- (2) illegal drug possession

Conditions that could mitigate security concerns:

- (1) the drug involvement was not recent;
- (2) the drug involvement was an isolated or infrequent event.

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 and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age 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 a prima facie case under criterion J (Criminal conduct) and criterion H (Drug involvement); 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 commission of a criminal offense, reflects a lack of judgment and discretion. The improper or illegal involvement with drugs also 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, then there exists the possibility that an applicant may demonstrate the same attitude towards security rules and regulations.

CONCLUSIONS

Considering first the Applicant's past criminal conduct -- his arrest in 1987, the investigations during the time frame 1989~1993, and firearm incident in 1994 -- these were all the product of his dealings with problem neighbors. Since he has moved from that neighborhood, it is clear that such conduct is unlikely to be repeated.

His admitted possession of an illegal substance in March of 1995, was a misguided effort on the Applicant's part to protect his son. He has paid the price for being an overly protective father by virtue of his having a felony conviction. He has also testified credibly that he will never again commit a crime to protect another (Tr at page 130 lines 1~8). I am thus convinced that this criminal incident, which occurred more than two years ago, is distant enough in time so as not to be of present security significance.

As to the Applicant's admitted abuse of marijuana in 1967, it is also clearly distant enough in time so as not to be of present security significance.

Considering all the evidence, the Applicant has rebutted the Government's prima facie case regarding his criminal conduct and drug involvement. The Applicant has thus met the mitigating conditions of Criteria J and H, and of Section F.3. of the Directive. Accordingly, he has met his ultimate burden of persuasion under Criteria J and H.

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.
- c. For the Applicant.
- d. For the Applicant.
- e. For the Applicant.
- f. For the Applicant.
- g. For the Applicant.

Paragraph 2: FOR THE APPLICANT

- a. For the Applicant.

b. For the Applicant.

c. For the Applicant.

d. For the Applicant.

e. 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 interests of national security to grant or continue a security clearance for the Applicant.

Richard A. Cefola

Administrative Judge