

DATE: February 27, 1998

In Re:

SSN:

Applicant for Security Clearance

ISCR Case No. 97-0435

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Renee L. Stasio, Esquire, Applicant's Counsel

STATEMENT OF THE CASE

On October 10, 1997, 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 October 28, 1997.

The case was received by the undersigned on December 9, 1997. A notice of hearing was issued on December 31, 1997, but pursuant to a request from Applicant's Counsel, the case was not heard until February 5, 1998. The Government submitted documentary evidence, and called two witnesses to testify. Testimony was taken from the Applicant, who also called a witness to testify on his behalf. The transcript was received on February 24, 1998. The issues raised here are whether the Applicant's admitted past security violations and related apparent past unwillingness to comply with rules 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 two Master Degrees, one in Electrical Engineering and the other in Communications Engineering, and is employed by a defense contractor. He currently holds a Secret security clearance, and his employer seeks retention of that level clearance on behalf of the Applicant.

Criterion K - Security Violations & Criterion E - Personal Conduct

1.a.(1) and 2.a. In 1986 while employed by a previous employer, the Applicant wrongfully copied four Department of Defense (DoD) Confidential documents (Transcript (TR) at page 55 line 9 to page 56 line 20). He properly stored the four documents in his employer's "classified container" (TR at page 56 lines 21~25). In January of 1987, however, when the Applicant left this employer, he improperly removed the Confidential documents from his employer's premises, and improperly stored them at his home (TR at page 57 line 1 to page 58 line 4). These documents remained at his home until he returned them to proper custody in January of 1996 (TR at page 80 lines 14~21). During the time frame he had the four documents stored at his house, the Applicant viewed them on two occasions, and never disclosed them to another person (TR at page 58 line 24 to page 60 line 9).

The Applicant described in the following terms why he wrongfully and improperly copied, removed, and stored the Confidential documents in question:

I'm a person who has spent their entire lifetime keeping abreast of different technologies. I've remained employable, because I've done that. I've taken classes throughout my career. And I viewed that reference material [the documents in question] as an opportunity to get into a very challenging field. And like I mentioned earlier, that analysis was excellent, exceptionally good. And so I wanted to retain that as a reference (TR at page 58 lines 7~14).

The Applicant's wrongful and improper copying, removal, and storage of the four Confidential documents in question constituted violations of the Industrial Security Manual, as alleged by the Government in the SOR and admitted to by the Applicant in his answer.

1.a.(2) and 2.a. In 1994 while employed by his present employer, the Applicant wrongfully copied and disguised the true classification of a DoD Secret document (TR at page 68 line 20 to page 71 line 23). This document was properly stored in the Applicant's "classified locker" (TR at page 70 lines 10~17). In April of 1995, however, the Applicant improperly removed the Secret document from his employer's premises, and improperly stored it at his home (TR at page 68 lines 14~19). This document also remained at the Applicant's home until he returned it to proper custody in January of 1996 (TR at page 80 lines 22~25). During the period of time he had this document stored at his house, the Applicant also viewed it on two separate occasions, and disclosed its contents to no one (TR at page 74 lines 1~3, and at page 75 lines 5~22).

As to the Applicant's motive for wrongfully and improperly copying, disguising, removing, and storing this Secret document, the Applicant offered the following credible explanation: "That document entailed and(*sic*) extensive cross link analysis. It was excellently done. And so, once again, I was interested in the analysis and not in a particular classified information" (TR at page 69 lines 5~8).

The Applicant's wrongful and improper copying, disguising, removal, and storage of the Secret document in question constituted violations of the Industrial Security Manual, as alleged by the Government in the SOR, and again as admitted to by the Applicant in his answer.

Mitigation

Since returning to proper custody the before mentioned classified documents in January of 1996, the Applicant has undergone an extensive reeducation program as to the handling of classified materials (TR at page 81 line 12 to page 82 line 25, at page 85 line 4 to page 86 line 25, and at page 88 lines 6~25, *see also* Applicant's Exhibit (AppX) N). He testified, "I'm practically paranoid about security. Whenever there is any issue that isn't covered explicitly by . . . [his employer's] guide, then I go and talk to the . . . [Program's] security representative" (TR at page 82 lines 21~24). He also testified credibly that under no circumstances would he repeat his past transgressions (TR at page 89 lines 12~21).

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:

Security Violations

Condition that could raise a security concern:

(3) violations that are deliberate. . .

Condition that could mitigate security concerns:

(4) demonstrate a positive attitude towards the discharge of security responsibilities.

Personal Conduct

Condition that could raise a security concern:

(5) a pattern of . . . rule violations;

Condition that could mitigate security concerns:

(5) the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or pressure;

As set forth in the Directive, "[e]ach 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 criteria K (Security Violations) and 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. Security responsibility safeguards include security regulations or

practices, the violation of which call into question one's security clearance competency.

CONCLUSIONS

The Applicant admittedly violated the Industrial Security Manual, as to the proper handling of two sets of classified documents, from 1986 until January of 1996. His deliberate violations vis-a-vis the four Confidential documents commenced in 1986 with his improper copying, and was compounded on 1987 when he took these documents home. In 1994, he committed similar violations with a Secret document. However, since bringing all of these documents back into proper custody more than two years ago, he has clearly demonstrated a very positive attitude towards the discharge of his security responsibilities.

The Applicant has gone through an extensive reeducation program as to his security responsibilities. A reeducation which is confirmed by his employer's security manager (AppX N). This heightened security awareness is further averred to in correspondence from his Department Manager (AppX M). The Applicant has also testified credibly as to his heightened awareness, and that his violations of more than two years past will not be repeated. I therefore conclude that his past improper conduct has been mitigated. I am also convinced this conduct will not be repeated. This, coupled with the Applicant's heightened security awareness, leads me to believe that he can be entrusted with classified materials.

Considering all the evidence, the Applicant has rebutted the Government's prima facie case regarding his past security violations and his related personal conduct. The Applicant has thus met the mitigating conditions of Criteria K and E, and of Section F.3. of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Criteria K and 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.

Paragraph 2: FOR THE APPLICANT

a. 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