

DATE: January 23, 1998

In Re:

SSN:

Applicant for Security Clearance

ISCR Case No. 97-0465

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On July 24, 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 Answers to the SOR on August 13 and 14, 1997.

The case was received by the undersigned on November 19, 1997. A notice of hearing was issued that same date, and the case was heard on December 18, 1997. The Government submitted documentary evidence. Testimony was taken from the Applicant, who called one witness to testify on his behalf. The transcript was received on January 6, 1998. The issue raised here is whether the Applicant's admitted inappropriate, and, in part, criminal sexual behavior 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 32 years of age, has a Bachelor's Degree in Electrical Engineering, and is employed by a defense contractor as a hardware and software designer. He currently holds a top secret security clearance, and his employer seeks retention of this level clearance on behalf of the Applicant.

Criterion D - Sexual behavior & Criterion J - Criminal conduct

1.a.-1.d. and 2.a. In 1994, for approximately three months, the Applicant had an extra-marital affair with a former high

school girl friend (Government Exhibit (GX) 2 at page 2). He has not seen this former girl friend since 1994, and has no intention of seeing her in the future (GX 2 at page 2). His wife is aware of the fact that the Applicant had this extra-marital affair (Transcript (TR) at page 23 line 21 to page 24 line 6). In 1995, the Applicant engaged the services of a prostitute (GX 2 at page 2). His actions vis-a-vis the prostitute constituted a petty misdemeanor under criminal code of the state in which the Applicant engaged the prostitute for her services (TR at page 17 line 22 to page 18 line 8). The Applicant's wife is aware that he engaged the services of a prostitute (TR at page 25 line 12 to page 26 line 1). From November of 1996 to January of 1997, the Applicant had a second extra-marital affair, this time with a friend of the family (GX 2 at page 2). He intends no future "romantic relationship" with this family friend (GX 2 at page 2). The Applicant's wife is also aware of this extra-marital affair (TR at page 24 line 21 to page 25 line 5, and page 30 lines 8~14). The Applicant intends no extra-marital affairs in the future (TR at page 27 line 20 to page 28 line 11, *see also* at page 33 line 21 to page 34 line 16).

Mitigation

The Applicant has not only told his wife of his above improper and, in part, criminal sexual behavior, but he has also informed business associates and various members of his family (TR at page 30 lines 16~21). He would further divulge the fact of his past inappropriate sexual behavior to the other members of his family if faced with undue influence or coercion (TR at page 30 line 22 to page 31 line 15).

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:

Sexual behavior

Conditions that could raise a security concern:

- (1) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (3) sexual behavior that causes an individual to be vulnerable to undue influence or coercion;
- (4) sexual behavior . . . that which reflects lack of discretion or judgment.

Condition that could mitigate security concerns:

- (4) the behavior no longer serves as a basis for undue influence or coercion.

Criminal conduct

Condition that could raise a security concern:

- (1) any criminal conduct, regardless of whether the person was formally charged;

Conditions that could mitigate security concerns:

- (1) the criminal behavior was not recent;
- (2) the crime was an isolated incident;

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 criterion D (Sexual behavior) and criterion 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.

Sexual behavior which involves a criminal offense, reflects a lack of judgment and discretion. 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

The Applicant admittedly engaged in inappropriate, and, on one occasion in 1995, criminal sexual behavior. He has demonstrated through credible evidence, to include the corroborative testimony of his spouse, however, that he has now seen the error of this past unacceptable behavior, and has no intentions of repeating it in the future. His behavior also set the Applicant up for possible undue influence or coercion. He has since divulged his past sexual behavior to those with a need to know, to include his spouse; and as such, has eliminated the possibility of any black mail.

His one time criminal conduct involving a prostitute constituted a petty misdemeanor under the criminal code of the state where the act was committed. Again, he has offered credible evidence that he intends no such future criminal conduct. I therefore conclude that the Applicant's past criminal indiscretion, of more than two years past, is not of present security significance.

The Applicant has thus met the mitigating conditions of Criteria D and J, and of Section F.3. of the Directive. Accordingly, he has met his ultimate burden of persuasion under Criteria D and J.

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

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