

DATE: February 18, 1998

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In Re:

SSN:

Applicant for Security Clearance

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ISCR Case No. 97-0689

**DECISION OF ADMINISTRATIVE JUDGE**

**RICHARD A. CEFOLA**

**APPEARANCES**

**FOR GOVERNMENT**

Martin H. Mogul, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**STATEMENT OF THE CASE**

On October 20, 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 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 or about November 4, 1997.

Applicant elected to have this case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) on January 5, 1998. Applicant was instructed to submit objections or information in rebuttal, extenuation or mitigation within 30 days of receipt of the FORM. Applicant received his copy on January 13, 1998, and submitted nothing in reply. The case was received by the undersigned for resolution on February 17, 1998. The issue raised here is whether the Applicant's admitted criminal 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, and the File of Relevant Material. The Applicant is 31 years of age, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant.

**Criterion J - Criminal conduct**

1.a. and 1.b. The Applicant was arrested in September of 1995, and subsequently found guilty of Theft Third,

Shoplifting (Government Exhibit (GX) 5 at page 1). He describes the circumstances that preceded his arrest in the following terms: I did take four items totaling approximately \$105.89, I was stopped outside of the store by store security. . ." (GX 5 at page 1). Five months later, in February of 1996, the Applicant was again arrested, and he subsequently pleaded Nolo Contendere to Theft of Property (GXs 6 and 7). He describes the circumstances that followed this arrest in the following terms: "I took a video card from ... [an] Electronics Store, . . I put the video card in the pocket of my jacket and left the store without paying for it" (GX 5 at page 1). As part of his sentence, on May 1, 1996, he was placed on Summary Probation for three years (GX 7 at page 2).

### Mitigation

The Applicant offers little in the way of mitigation, except to aver, "I have no future intent to break any laws" (GX 5 at page 2).

## **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 or multiple lesser offenses.

#### Conditions that could mitigate security concerns:

None.

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 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 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, has two separate convictions for theft within the last three years. The second arrest also occurred only five months after his first, and demonstrate a definite pattern of criminal conduct. It is further noted that the Applicant is still on probation as a result of his most recent "run in with the law;" and as such, it is too soon to say that this pattern of criminal conduct is not of present security significance.

Considering all the evidence, the Applicant has not rebutted the Government's prima facie case regarding his criminal behavior. The Applicant has thus not met the mitigating conditions of Criterion J, and of Section F.3. of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Criterion 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 interests of national security to grant or continue a security clearance for the Applicant.

**Richard A. Cefola**

**Administrative Judge**