

DATE: March 16, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0727

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Thomas A. Abbott, Esquire, Applicant's Counsel

STATEMENT OF THE CASE

On October 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 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.

The SOR is attached.

Applicant filed an Answer to the SOR on November 10, 1997.

The case was received by the undersigned on January 8, 1998. A notice of hearing was initially issued on January 13, setting the hearing for February 12, 1998, but pursuant to a request of Applicant's Counsel, the case was heard on February 26. The Government submitted documentary evidence, and called one witness to testify. Testimony was taken from the Applicant. The transcript was received on March 10, 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, the documents and the live testimony. The Applicant is 42 years of age, and has a Juris Doctor Degree. He is the President and Chief Executive Officer (CEO) of a defense contractor, and his firm seeks a secret security clearance on behalf of the Applicant.

Criterion J - Criminal Conduct

1.a. The Applicant was arrested in November of 1990, and subsequently, pursuant to his plea, was found guilty of (1) Conspiracy to Make False Statements and Aiding Abetting and Illegal Campaign Contributions to a Political

Committee, (2) Conspiracy to Defraud the United States, and (3) Making and Subscribing False Corporate Income Tax Returns (Transcript (TR) at page 26 lines 21~23, and Government Exhibit (GX) 3 at page 1). As part of his sentence, he was incarcerated for 15 and a half months of an 18 month sentence (TR at page 26 line 24 to page 27 line 4). He was ultimately released from a halfway house in April of 1993 (TR at page 56 lines 21~24).

The genesis of this three count conviction is the following: the Applicant purchased the defense contractor, of which he is now the President and CEO, in September of 1987 (TR at page 46 lines 7~8). Prior to this purchase, the former owner received a mistaken double payment from the U. S. Navy in the amount of \$980,000 (TR at page 46 lines 1~18). Instead of reporting this double payment to the Navy, the prior owner converted the proceeds to his firm's use (TR at page 46 line 19 to page 47 line 1). The Applicant discovered this wrongful conversion only after he purchased the defense contractor (TR at page 47 lines 2~6). Fearing that by disclosing this overpayment he would jeopardize his firm's existence, in the spring of 1988, False Corporate Income Tax Returns were filed showing the \$980,000 as income (TR at page 47 line 7 to page 49 line 3). A correct Corporate Tax Return was subsequently filed, and the \$980,000 was ultimately paid back to the Navy (TR at page 49 lines 4~6).

In 1986, prior to his purchase of the defense contractor, and unbeknownst to the Applicant, the prior owner also improperly converted \$1,400,000 of his employee's profit sharing plan's funds to the use of the defense contractor (TR at page 39 line 12 to page 40 line 17). After acquiring the defense contracting firm, the Applicant discovered this improper transaction. He was required to file documents with the Department of Labor showing the status of the profit sharing account (TR at page 40 lines 18~20). Again, fearing that the disclosure of this debt to his employee's profit sharing plan would jeopardize his firm's existence, in 1987 he misstated the health of the profit sharing fund to the Department of Labor; i.e., a Conspiracy to Defraud the United States (TR at page 40 line 20 to page 41 line 2, and at page 43 lines 1~22). The Applicant, through the defense contractor, is currently paying back \$15,000 a month, with interest, to the profit sharing plan, and currently owes about \$150,000 to complete the pay back (TR at page 42 lines 1~25).

Finally, shortly after acquiring the defense contractor, the Applicant set up a "dummy" company for the purpose of funneling campaign contributions to federal office holders. Through this "dummy" company, some of his employees could knowingly contribute in excess of the \$1,000 per person permitted by Federal Law (TR at page 20 line 19 to page 25 at line 25). It was hoped that, through these illegal contributions, his firm "would have some access to certain members of Congress" (TR at page 49 line 25 to page 51 line 21). To the contrary, however, "[it] probably caused the vast majority of . . . [his] problems" (TR at page 51 lines 22~24).

Mitigation

The Applicant offers impressive mitigating evidence. He has accepted full responsibility for his actions, and has testified credibly that such criminal activity will never be repeated (TR at page 62 line 21 to page 63 line 11, and at page 69 line 2 to page 71 line 7). He has also offered a litany of declarations in support of his being granted a security clearance (Applicant Exhibits (AppXs) A~J). Of particular note are the declarations of a Navy Captain and of a Navy Commander, who are the Navy's senior representatives in dealings with the Applicant's firm (AppXs H and J).

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

Condition that could raise a security concern:

(2) a single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns:

(1) the criminal behavior was not recent;

(5) there is clear evidence of successful rehabilitation.

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, admittedly, made a series unfortunate decisions in 1987 and 1988 which ultimately led to his conviction and incarceration. It must be noted, however, that this criminal conduct occurred ten years ago. Furthermore, the Applicant has, for the most part, paid his "debt to society" through his incarceration which ended in April of 1993, nearly five years ago. He has also offered very credible evidence, through his candid testimony and through the

persuasive declarations of those who know him, that such conduct will not be repeated. During the past five years, the Applicant has reestablished his firm's good name as a valued Navy contractor, and thereby further demonstrate his rehabilitation. I therefore conclude that Applicant's past criminal conduct of the decade past is not of present security significance.

Considering all the evidence, the Applicant has rebutted the Government's prima facie case regarding his past criminal behavior. The Applicant has thus met the mitigating conditions of Criterion J, and of Section F.3. of the Directive. Accordingly, he has 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: 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