KEYWORD: Sexual Behavior; Criminal Conduct

DIGEST: Due to a criminal conviction for which he served 20 months of confinement, the Defense Department is prohibited from granting Applicant a security clearance unless a waiver is granted. Eligibility for a security clearance is denied solely as a result of 10 U.S.C. § 986(c)(1).

CASENO: 06-23605.h1

DATE: 08/30/2007

DATE: August 30, 2007

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| In re: | ) | |
| | ) | |
| ---------- | ) | ISCR Case No. 06-23605 |
| SSN: ---------- | ) | |
| | ) | |
| Applicant for Security Clearance | ) | |

**DECISION OF ADMINISTRATIVE JUDGE**
**MICHAEL H. LEONARD**

## APPEARANCES

**FOR GOVERNMENT**
Stephanie C. Hess, Esq., Department Counsel

**FOR APPLICANT**
*Pro Se*

## SYNOPSIS

Due to a criminal conviction for which he served 20 months of confinement, the Defense Department is prohibited from granting Applicant a security clearance unless a waiver is granted. Eligibility for a security clearance is denied solely as a result of 10 U.S.C. § 986(c)(1).

## STATEMENT OF THE CASE

### *A. Introduction*

In October 1998, Applicant pleaded guilty to cruelty to children to receive deferred adjudication under the Georgia First Offender Act. He was confined for 20 months and then served probation until May 2007, when he was discharged without an adjudication of guilt. Under 10 U.S.C. § 986, a person who has been convicted of a crime and served more than one year of confinement is disqualified from being granted a security clearance. Because federal courts have decided that a deferred adjudication under Georgia's first-offender law is a conviction for sentencing and immigration purposes, it follows that Applicant has a conviction for security-clearance purposes.

### *B. Procedural background*

Applicant contests the Defense Department's intent to deny his eligibility for a security clearance. Acting under the relevant Executive Order and DoD Directive,[1] the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on February 9, 2007. The SOR—which is equivalent to an administrative complaint—details the factual basis for the action and alleges security concerns under Guideline D for sexual behavior and Guideline J for criminal conduct. In addition, the SOR includes an allegation that Applicant is disqualified, as a matter of law, from having a security clearance granted or renewed by the Defense Department under 10 U.S.C. § 986.

In addition to the Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005. The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.[2] The Directive is pending formal amendment. The Revised Guidelines apply to this case because the SOR is dated February 9, 2007, which is after the effective date.

[1] Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).

[2] *See* Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

On March 16, 2007, Applicant replied to the SOR and requested a hearing. He amended his reply to the SOR on May 24, 2007. The case was assigned for hearing to another administrative judge on May 9, 2007. It was reassigned on June 9, 2007. The hearing took place as scheduled on June 19, 2007.

At hearing, the SOR was amended, without objections, by removing subparagraph 1.c from Guideline D and placing it under Guideline J as subparagraph 2.b (R. 17–18). This action was taken so that the 10 U.S.C. § 986 allegation was properly alleged under Guideline J. Also without objections, the SOR was amended by changing subparagraph 1.a to reflect that Applicant pleaded guilty to one count, not two, of cruelty to children (R. 25–26). This action was taken to conform to the evidence.

DOHA received the hearing transcript on June 27, 2007. The record was left open until July 13, 2007, to allow the parties to brief the central issue in this case: Does Applicant's guilty plea and sentence to confinement and probation under Georgia's first-offender law constitute a conviction for purposes of 10 U.S.C. § 986? Both parties submitted briefs (Appellate Exhibits II and III).

## FINDINGS OF FACT

Based on the record evidence as a whole, the following facts are established.

Applicant is a 39-year-old engineer with a bachelor's degree in aerospace engineering. He has worked for his current employer since January 2001 (Exhibit B). He initially worked as a manufacturing engineer on microwave switching equipment for space applications. Based on his work ethic and adaptability, he was reassigned to the company's mechanical production group. The company recently reassigned Applicant to the mechanical engineering group to take advantage of his multiple skills. For this role, Applicant may need access to classified information to work on the company's secured programs. He has been a key performer for the company and has established a strong work record.

Applicant completed a security-clearance application in November 2005 (Exhibit 1). This is his initial application to obtain a security clearance from the Defense Department. In response to a question about his police record, he fully disclosed his 1995 arrest and 1998 guilty plea to one count of cruelty to children based on sexual activity with a 13-year-old girl.

In about 1994, Applicant's family met the girl's family through church. The girl was the youngest of several children in that family. For a brief period, Applicant dated the 25-year-old sister of the girl. During September–November 1995, the then 27-year-old Applicant engaged in sexual activity with the 13-year-old girl. The sexual activity consisted of oral sex received by Applicant and mutual touching. The sexual activity took place in a car when Applicant was giving the girl a ride home from an event or activity. It took place about five to seven times. Applicant did not orchestrate things so he could be alone with the girl, but he did not prevent it from happening. Some weeks before his arrest, Applicant told the girl they could no longer be alone and he would not give her rides home if they were alone in the car.

Applicant was unable to find a job working as an engineer after completing his degree in December 1994. About one year later, he decided to follow his father's footsteps and applied to become a firefighter. In December 1995, he disclosed his sexual activity with the girl during a routine pre-employment polygraph examination. Two weeks later he was arrested and charged with felony child molestation and felony aggravated child molestation.

In October 1998, Applicant pleaded guilty to one count of cruelty to children (Exhibit C). It was a negotiated plea under the Georgia First Offender Act.[3] It resulted in the court not imposing a judgment of guilt and deferring proceedings. The court sentenced Applicant to confinement for two years followed by probation for eight years. Applicant was confined in a minimum-security facility from February 1999 until his release in early October 2000, a period of about 20 months.

As a probation requirement, Applicant entered a treatment program. In October 2000, he had a psychosexual evaluation to assess his then psychosexual functioning and need for sex-offender treatment (Exhibit A). During the initial evaluation, Applicant admitted molesting the 13-year-old girl, but he minimized his conduct and blamed the victim. The evaluation recommended that Applicant enroll in a structured, cognitive-behavioral sex-offender treatment program involving group and individual treatment. Applicant attended the program since November 2000.

The active phase of treatment consisted of 7 phases of treatment covered in a minimum of 75 weeks. The aftercare phase of treatment consisted of group therapy for one year and then reduced in the maintenance phase. The maintenance phase of treatment consisted of therapeutic services in support of a relapse prevention plan for one year. As of July 2006, he was in full compliance with the treatment recommendations and conditions of probation, deemed to be a low risk to reoffend, and did not meet the diagnostic criteria for a pedophile (a person sexually attracted to children). Since July 2006, Applicant completed the counseling and treatment requirements required by probation and was released by his counselor with permission from his probation officer (Exhibit F).

On May 15, 2007, the court terminated Applicant's probation (Exhibit F). This action was taken more than one year ahead of the scheduled termination in October 2008. Two weeks later, the court discharged Applicant under the state's first-offender law without a court adjudication of guilt (Exhibit G).

At one time, Applicant was required to register with the state's sexual-offender registry. He is no longer required to register due to his discharge under the state's first-offender law.[4] With the parties' consent, a search was conducted of Georgia's online sexual-offender registry (R. 73–75). The search was conducted using Applicant's name and address and the result was "no offender found."[5]

Applicant attributed his criminal conduct to sexual naivete and low self-esteem. He was raised in a strict, religious home. It was a sheltered environment that he believes did not prepare him

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[3] O.C.G.A. § 42-8-60 – 65.

[4] O.C.G.A. § 42-1-12(8).

[5] *See* www.ganet.org/gbi.

sexually or socially. His misconduct with the 13-year-old girl came after a long-term relationship ended in 1993. This breakup devastated Applicant emotionally and left him with low self-esteem. He accepts responsibility for his conduct, and he understands that as an adult he had a duty to prevent any sexual activity with a minor child. Through the sex-offender treatment program, Applicant learned about the offense cycle as well as techniques to prevent a relapse. Also, Applicant is careful not to put himself in a compromising position. For example, although he and his family attend church, he does not teach Sunday school or participate in youth programs.

Applicant's wife testified on his behalf (R. 99–112). She is 40 years old and has degrees in child development and education. She taught school in the past, and she has been a stay-at-home mother since the birth of their son about four years ago. She met Applicant in 1997, and they married in March 2001. She learned about his pending criminal charges early in their dating. She describes Applicant as an incredible father and husband. Applicant has been reliable, trustworthy, honest, and used good judgment during their marriage. She has never had any concerns that Applicant was sexually interested in young girls. They base their marriage on God's principles, they keep their family in church, and Applicant is head of the household.

## GENERAL PRINCIPLES OF LAW AND POLICIES

No one has a right to a security clearance.[6] As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[7] A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.[8] An unfavorable decision: (1) denies any application; (2) revokes any existing security clearance; and (3) prevents access to classified information at any level and retention of any existing security clearance.[9] Under *Egan,* Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[10] The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[11] An applicant is responsible for presenting evidence

[6] *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.").

[7] *Egan*, 484 U.S. at 531.

[8] Directive, ¶ 3.2.

[9] Directive, ¶ 3.2.

[10] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[11] Directive, Enclosure 3, ¶ E3.1.14.

to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[12] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[13] *In Egan*, the Supreme Court said that the burden of proof is less than the preponderance of the evidence.[14] The agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[15]

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.[16] Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

## CONCLUSIONS

### *A. Applicant's guilty plea and sentence to confinement and probation under Georgia's first-offender law is a conviction under 10 U.S.C. § 986.*

The government contends, as alleged in SOR subparagraph 2.b, that federal law disqualifies Applicant from security-clearance eligibility. Applicant contends that his discharge under the Georgia First Offender Act is not a conviction and that 28 U.S.C. § 1738 requires the federal government to honor the state's decision to treat the discharge as a non-conviction. The issue is whether Applicant's guilty plea and sentence to confinement and probation under Georgia's first-offender law constitutes a conviction for purposes of 10 U.S.C. § 986, the so-called Smith Amendment.[17]

Several years ago, Congress enacted a law that prohibited the Defense Department from granting or renewing a security clearance for certain persons falling into one or more of four

[12] Directive, Enclosure 3, ¶ E3.1.15.

[13] Directive, Enclosure 3, ¶ E3.1.15.

[14] *Egan*, 484 U.S. at 531.

[15] ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

[16] Executive Order 10865, § 7.

[17] S*ee* Attorney Sheldon I. Cohen's publication *Loss of a Security Clearance Because of a Felony Conviction: The Effect of 10 U.S.C. § 986, the "Smith Amendment,"* at www.sheldoncohen.com/publications (background information on the origin of this statutory prohibition).

categories.[18] For a person with a criminal conviction, the current version of 10 U.S.C. § 986 prohibits that Defense Department from granting or renewing a security clearance if "the person has been convicted in any court of the United States of a crime, was sentenced to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year."[19] Accordingly, an applicant who has been sentenced to more than one year, but instead served probation, or who served less than a year of incarceration, is now eligible for a security clearance.

The law also authorizes a waiver in a meritorious case if there are mitigating factors. A waiver of the prohibition is permitted for two of the four types of cases covered by the Smith Amendment: (1) where a person has been convicted and sentenced to imprisonment for more than one year; and (2) where a person has been discharged or dismissed from the Armed Forces under dishonorable conditions.[20] Within DOHA, waivers are governed by Operating Instruction (OI) 64.[21] In summary, OI 64 implements the waiver authority granted to the Director of DOHA by the Under Secretary of Defense (Intelligence). Also, OI 64 addresses an administrative judge's responsibilities in handling a case. First, a judge's authority is limited to determining if the law applies to the facts of the case.[22] Second, if it does apply, no waiver recommendation of any kind will be made.[23]

The plain language of 10 U.S.C. § 986 does not define the term conviction. And the DOHA Appeal Board has not decided if a discharge under the Georgia First Offender Act is a conviction under 10 U.S.C. § 986. Therefore, it is appropriate to look for guidance elsewhere.

A sentence imposed under Georgia's First Offender Act allows a first-time offender to be placed on probation or sentenced to confinement or both and serve out that probation or confinement without an adjudication of guilt.[24] Under Georgia law, Applicant's discharge under the first-offender law is not a conviction because state law provides that a discharge under the act "is not a conviction of a crime under the laws of this state. . . ."[25] Consistent with the statute, the Georgia Supreme Court has held that a probationary sentence under the first-offender law, if completed without violation, is not a conviction.[26] Applicant argues that federal law requires that a state's interpretation of its laws must be given full faith and credit, and therefore, he does not have a conviction for purposes of 10 U.S.C. § 986.

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[18] 10 U.S.C. § 986(c)(1) – (4) (2000).

[19] 10 U.S.C. § 986(c)(1) (2004).

[20] 10 U.S.C. § 986(d) (2004).

[21] DOHA Operating Instruction No. 64, Sept. 12, 2006.

[22] OI 64, ¶ 2.e.

[23] OI 64, ¶ 3.f.

[24] O.C.G.A. § 42-8-60 – 65.

[25] O.C.G.A. § 42-8-63.

[26] *State v. Wiley*, 210 S.E.2nd 790, 791 (1974), *on remand* 213 S.E.2nd 15 (1975).

Under federal law (28 U.S.C. § 1738) and Article IV, § 1, of the U.S. Constitution, a state's interpretation of its laws must be given full faith and credit in every court within the United States. In other words, the Georgia Supreme Court would have the ultimate say over the meaning of a conviction under Georgia law. The full-faith-and-credit clause argument was made—in a dissenting opinion—in a sentencing appeal where the Sixth Circuit concluded that a sentence of probation under Georgia's First Offender Act was a conviction that had become final for sentencing purposes.[27] Likewise, although the case did not involve 10 U.S.C. § 986, the DOHA Appeal Board concluded that 28 U.S.C. § 1738 does not require DOHA Judges to refer to state law when deciding if collateral estoppel applies to state misdemeanor convictions.[28] The Appeal Board reasoned that although 28 U.S.C. § 1738 applies to federal courts, it does not apply to federal executive branch agencies.[29] And the Appeal Board noted practical reasons for not applying 28 U.S.C. § 1738 to a security-clearance case. The rationale expressed in that opinion would seem to apply here.

In cases involving 10 U.S.C. § 986, the DOHA Appeal Board has held: (1) what constitutes a conviction under the statute is a question of federal law, not state law; and (2) a state pardon does not negate applicability of the statute.[30] The Appeal Board reviewed the statute and concluded that because "nothing in the statute indicates Congress intended the DoD to be bound by state law concerning what constitutes a conviction, Applicant's reliance on details of state law is misplaced."[31] Also, the Appeal Board concluded that in determining whether a person is convicted, a key consideration was the practical reality of whether a person has been convicted as opposed to the particular labels describing a person's status.[32]

Recently in 2005 and 2006, the Fifth, Sixth, and Eleventh Circuits have concluded that a deferred adjudication under Georgia's first-offender law was a conviction for sentencing purposes.[33] Likewise, a deferred adjudication is a conviction for immigration purposes so long as it satisfies the

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[27] *United States v. Miller*, 434 F.3d 820 (6th Cir. 2006), *cert. denied* 547 U.S. 1086 (2006).

[28] ISCR Case No. 04-05712 (App. Bd. Oct. 31, 2006).

[29] *Id.*, (citations omitted).

[30] ISCR Case No. 01-00407 (App. Bd. Sept. 18, 2002).

[31] *Id*.

[32] *Id.*, *citing Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983) (person is a convicted felon under federal firearms statute even though his state conviction was expunged); *United States v. Lehman*, 613 F.2d 130, 135 (5th Cir. 1980) (person is a convicted felon under federal firearms statute even though there was no final conviction under state law).

[33] *United States v. Garcia-Zamudio*, 171 Fed.Appx 478 (5th Cir. 2006) (not selected for publication in the Federal Reporter) (defendant's non-conviction under the Georgia First Offender Act for a drug-trafficking offense constituted a conviction for sentencing enhancement purposes); *Miller*, 434 F.3d 820 (sentence of probation under Georgia's First Offender Act in a drug case was a prior conviction that had become final for purposes of mandatory minimum); *United States v. Knight*, 154 Fed.Appx. 798 (11th Cir. 2005) (not selected for publication in the Federal Reporter) (defendant's prior drug conviction under Georgia First Offender Act was a conviction for purposes of sentencing guidelines criminal history category).

requirements of the immigration statute dealing with convictions.[34] For example, in 2006 the Eleventh Circuit ruled in a case where an alien pleaded guilty in 1993—under Georgia's first-offender law—to two counts of child molestation and was sentenced to five years' probation on each count, to be served concurrently.[35] The court concluded that the alien's guilty plea and sentence to probation constituted a conviction for purposes of immigration law even though it was not accompanied by an actual adjudication of guilt.

Here, the facts are undisputed. First, Applicant was arrested and charged with two counts of child molestation. Second, he entered a negotiated guilty plea to one count of cruelty to children. Third, he was sentenced to two years of confinement followed by eight years of probation. Fourth, he served approximately 20 months of confinement and then served probation until May 2007. Fifth, his probation was terminated with his first-offender status in tact and he was discharged without an adjudication of guilt. Given these facts, the practical reality is that Applicant pleaded guilty to a felony and the state court imposed a sentence that resulted in substantial punishment (confinement for 20 months) and restraint on his liberty (multi-year probation). It has all the markings of a conviction, except an adjudication of guilt under the state's statutory scheme for first-time offenders.

Nevertheless, federal caselaw addressing the Georgia First Offender Act establishes that deferred adjudications are convictions for sentencing and immigration purposes. A similar conclusion is warranted for a security-clearance case, which is a federal administrative proceeding that is similar to immigration proceedings (legal proceedings without juries where the immigration judge, like a DOHA administrative judge, makes both findings of fact and conclusions of law; also, strict rules of evidence do not apply and hearsay is admissible). To conclude otherwise would disregard the practical reality of Applicant's case and elevate a label, based on state law, over the undisputed facts.

For the reasons discussed above, Applicant's guilty plea to one count of cruelty to children and sentence to confinement and probation under Georgia's First Offender Act is a conviction under 10 U.S.C. § 986 even though it was not accompanied by an actual adjudication of guilt. Specifically, Applicant's case falls within 10 U.S.C. § 986(c)(1) because the record evidence establishes that Applicant was incarcerated for not less than one year. Accordingly, the Defense Department may not grant (or renew) a security clearance for Applicant without a waiver.

***B. Aside from the disqualifying conviction, Applicant mitigated the sexual behavior and criminal conduct security concerns.***

Because the sexual behavior and criminal conduct allegations in the SOR are factually interrelated, they are discussed together. The government contends that Applicant's history of sexual behavior of a criminal nature raises security concerns under Guidelines D and J. Applicant contends that he has presented sufficient evidence of reform and rehabilitation to mitigate any security concerns. The question is whether Applicant's history of sexual behavior of a criminal nature with

[34] 8 U.S.C. § 1101(a)(48)(A)(i) and (ii) (two-part definition of conviction includes deferred adjudication of guilt as long as there has been a finding of guilt or a plea of guilty or nolo contendere and the court has imposed some form of punishment, penalty, or restraint on the alien's liberty).

[35] *Ali v. U.S. Attorney General*, 443 F.3d 804, 809–810 (11th Cir. 2006).

a 13-year-old girl is consistent with eligibility for access to classified information under the clearly-consistent standard.

Under Guideline D, sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress or reflects lack of judgment or discretion.[36] Under Guideline J, criminal conduct is a security concern because criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. It calls into question a person's ability or willingness to comply with laws, rules, and regulations.[37]

Here, based on the record evidence as a whole, security concerns are raised under Guidelines D and J. The record evidence shows Applicant has a history of sexual behavior of a criminal nature. His sexual activity with a 13-year-old girl was serious misconduct, as reflected by the initial charges, the negotiated guilty plea, and the sentence. Also, his misconduct reflects a gross lack of good judgment. When he engaged in this misconduct in late 1995, Applicant was 27 years old. As an adult, he knew what he was doing was wrong, yet he allowed the activity to occur, not once, but several times. His history of sexual behavior of a criminal nature raises security concerns under the applicable DCs of the guidelines.[38]

Several of the MCs under the guidelines apply in Applicant's favor. The applicable MCs are summarized and discussed below.

MC 2 under Guideline D—the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances that it is unlikely to recur—applies. Applicant engaged in the sexual activity with the girl in 1995, about 12 years ago. After pleading guilty in 1998, he served confinement and probation. He complied with the terms of his probation, he completed treatment and counseling requirements, he has not engaged in further misconduct, he is gainfully employed as an engineer, and he now has a wife and child. Given these circumstances, his misconduct is not recent and all indications are that is unlikely to recur.

MC 1 under Guideline J—so much time has elapsed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur—is similar to MC 2 under Guideline D. It applies using the same rationale. Given the passage of time and current circumstances, his criminal conduct is not recent and it no longer casts doubt on his current reliability, trustworthiness, or good judgment.

MC 4 under Guideline J—there is clear evidence of successful rehabilitation—applies based on the following: (1) his expression of remorse; (2) the passage of time since his release from confinement without recurrence of any misconduct; (3) his favorable employment record; (4) his stable family life as a husband and father; (5) his early termination of probation; and (6) his

[36] Revised Guidelines at 9 (setting forth the disqualifying and mitigating conditions).

[37] Revised Guidelines at 21–22 (setting forth the disqualifying and mitigating conditions).

[38] Guideline D DC 1 ("sexual behavior of a criminal nature, whether or not the individual has been prosecuted"); Guideline D DC 4 ("sexual behavior of a public nature and/or that reflects lack of discretion or judgment"); and Guideline J DC 1 ("a single serious crime or multiple lesser offenses").

discharge under the state's first-offender law without an adjudication of guilt. Indeed, it appears that Applicant is a success story in the Georgia criminal-justice system. Taken together, these circumstances are evidence of reform and rehabilitation.

The same circumstances have been considered under the whole-person concept. His track record as husband and father, a successful engineer, and a law-abiding citizen for the last several years are persuasive evidence that the likelihood of additional misconduct is low. His demonstrated ability to lead a responsible and productive life for a significant period after his release from confinement in 2000 is evidence of reform and rehabilitation. This is a key factor, and it deserves substantial weight. And it should be noted that Applicant's misconduct might have never come to light but for his self-reporting during the pre-employment polygraph examination.

Viewing the record evidence as a whole, Applicant presented sufficient evidence to explain, extenuate, or mitigate the sexual behavior and criminal conduct security concerns alleged in SOR subparagraphs 1.a, 1.b, and 2.a. Based on his conviction and serving 20 months of confinement, however, he is disqualified from having a security clearance granted (or renewed) by the Defense Department under 10 U.S.C. § 986(c)(1). Accordingly, this case is decided against Applicant based solely on the Smith Amendment.

## FORMAL FINDINGS

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| SOR ¶ 1–Guideline D: | For Applicant |
| Subparagraphs a–b: | For Applicant |
| SOR ¶ 2–Guideline J: | Against Applicant |
| Subparagraph a: | For Applicant |
| Subparagraph b: | Against Applicant |

## DECISION

In light of all the circumstances, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Eligibility for a security clearance is denied solely as a result of 10 U.S.C. § 986(c)(1).

Michael H. Leonard
Administrative Judge