

DATE: August 15, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 00-0028

**DECISION OF ADMINISTRATIVE JUDGE**

**BURT SMITH**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn D. MacKinnon, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant was convicted of felony sexual abuse of his two daughters, and he was sentenced to ten years' imprisonment, suspended in part. The provisions of 10 U.S.C. 986 preclude a grant of clearance in his case, absent waiver by the Secretary of Defense as a meritorious case, but waiver is not recommended. Clearance is denied.

**STATEMENT OF THE CASE**

On December 10, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant. The SOR details 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 Applicant. It recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked. In an answer notarized on December 28, 2001, Applicant responded to the SOR, with supporting documents, and he elected to have his case decided on the written record in lieu of a hearing.

A complete copy of the Government's File of Relevant Material (FORM) was provided to the Applicant on March 5, 2002, and he was afforded thirty days to file objections and submit further material in refutation, extenuation, or mitigation. Applicant received the FORM on March 13, 2002, and he submitted additional information on April 3, 2002. The case was initially assigned to another Administrative Judge, and it was transferred to me on May 31, 2002.

**FINDINGS OF FACT**

The Applicant is 55 years old, and he is employed by a defense contractor as a marketing vice president. He seeks a DoD security clearance in connection with his employment in the civilian defense industry. The Government opposes the Applicant's request for a security clearance on the basis of allegations set forth under Paragraph 1 of the SOR. The following findings of fact are entered as to the allegations.

Paragraph 1 (Guideline J- Criminal Conduct). The Government alleges in this paragraph that in 1991 Applicant was convicted of felony sexual child abuse, and he was sentenced to imprisonment. According to the Government, Applicant's criminal conduct and conviction disqualify him from holding a DoD security clearance.

The facts of this case have been adjudicated in two previous proceedings, both criminal and administrative, and they are largely undisputed. In summary, the Applicant was prosecuted and convicted for the sexual child abuse of his two daughters, the acts occurring when the girls were teens and pre-teens.

The older daughter was molested by Applicant during the ten-year period 1978 through 1988 when she was age seven to seventeen years. The younger daughter was molested by Applicant during the one-year period 1987 through 1988 when she was age thirteen to fourteen years. At the insistence of the older daughter the Applicant stopped the molests in 1988. However, they were revealed by the daughters upon the occasion of Applicant's divorce from his first wife in 1990. (Applicant married his present wife in the same year.)

In March 1991 Applicant was indicted on three counts of child abuse. He pleaded guilty, and he was sentenced to ten years imprisonment with all but eighteen months suspended, to be followed by five years probation. He completed his confinement sentence through a live-in/work-out program, and he was discharged from probation in July 1997. Psychological treatment was also required, and Applicant completed this treatment in November 1997. He is regarded as a low risk for reoffending.

At the time Applicant molested his daughters he was on active duty in the US Army as a field grade officer assigned to duties in military intelligence. He retired in 1988 with the rank of lieutenant colonel and he entered the civilian defense industry, holding a security clearance. Upon learning of Applicant's indictment for child molest the DoD withdrew his clearance, and Applicant requested a hearing into the matter which was conducted in July 1993.

At the hearing the Applicant did not deny the Government's allegations of felony child abuse, asserting instead in mitigation that he was reformed and his lengthy record of good service supported his request for a restoration of clearance. During the hearing it was found that Applicant had also sexually fondled his younger half-sisters at an earlier time in his life, prior to the molests of his daughters. On September 27, 1993 the Administrative Judge issued a decision denying Applicant's request for a security clearance. (DISCR OSD Case No. 92-1542.) Applicant now makes a reapplication for a security clearance.

As part of his reapplication Applicant provides a six-page letter dated April 3, 2002, with enclosures, in which he states his argument in support of a grant of clearance. Applicant points out that since his conviction he has conducted himself in a manner demonstrating he is a trustworthy and reliable person who can be counted upon to protect the nation's defense secrets. He encloses a letter from his present wife of eleven years, and in her letter the wife gives assurance that Applicant is indeed remorseful, reformed and honest with respect to his past acts of child molest. She states that her marriage to Applicant is stable and enduring, and Applicant is dedicated to the welfare of his family.

## **POLICIES**

Enclosure 2 of the Directive, as amended by DepSecDef Memo June 7, 2002, sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. The guidelines are divided into those that may be considered in deciding whether to deny or revoke an Applicant's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's request for access to classified information (Mitigating Conditions).

Based upon a consideration of the entire record, I find the following adjudicative guidelines have application in this case:

Guideline J - Criminal Conduct. *The concern*: A history of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Disqualifying Conditions applicable:

1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses;
3. Conviction in a Federal or State court, including a court-martial, and sentenced to imprisonment for a term exceeding one year;

Mitigating Conditions applicable:

1. The criminal conduct was not recent.

The whole person concept. In addition to the above guidelines, the Directive provides in Para. E.2.2.1. that under the "whole person concept" the Administrative Judge shall also consider (1) the nature, extent and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Title 10 U.S.C., Section 986. Notwithstanding the above Policies, under the provisions of 10 U.S.C. 986, a Federal law, the Department of Defense may not grant or renew a security clearance to an Applicant who has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year, regardless of the amount of time actually served. However, the Secretary of Defense or the Secretary of the Military Department concerned may authorize a waiver of this prohibition in certain meritorious cases.

### CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where reliable information indicates an Applicant for clearance may be involved in criminal activities demonstrating a lack of trustworthiness and respect for the law. In a commonsense view, this unfavorable personal characteristic might easily lead to a compromise or loss of classified defense secrets.

With regard to burden of proof in DOHA cases, the Government must prove all controverted facts that tend to demonstrate Applicant is ineligible for clearance. Once this burden is met, the Applicant must overcome the Government's case, if he or she is to prevail, by persuasive evidence in refutation, mitigation, or changed circumstances. However, the Applicant always bears the ultimate and overall burden of proving that it is clearly consistent with the national interest to grant him or her a security clearance. Furthermore, the Directive provides that "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, Para. E2.2.2.) Thus, the Applicant's burden is a heavy one.

The provisions of 10 U.S.C. 986 apply in this case because in 1991 the Applicant was convicted of multiple offenses of sexual child abuse, and he was sentenced to 10 years confinement, all but eighteen months suspended. The record does not indicate the conviction and sentence were appealed, modified, or reduced. Therefore, the Department of Defense may not lawfully grant a security clearance to Applicant unless the Secretary of Defense authorizes a waiver of this statutory prohibition as a meritorious case.

In order to evaluate whether a case governed by 10 U.S.C. 986 is meritorious for waiver purposes, the evidence is adjudicated in accordance with current regulatory guidance, to include applicable due process procedures. Accordingly, the evidence of this case is considered against the Disqualifying Conditions and itigating Conditions applicable to Guideline J as well as the whole person concept, set forth above.

In this case it is concluded that Disqualifying Conditions 1.; 2.; and 3. of Guideline J have application and must be considered against the Applicant. The basis for application of these Disqualifying Conditions is self-evident and

requires little supporting discussion. Applicant admitted to and was convicted of several serious offenses, and he was sentenced to imprisonment for a term exceeding one year.

With regard to the Mitigating Conditions of Guideline J, only conditions 1. and 6. have a possible application. Mitigating Condition 1. is applicable where the criminal behavior "was not recent," and in this case the last occurrence of sexual molest occurred fourteen years ago. By any reasonable standard Applicant's last criminal misconduct is not recent, and Mitigating Condition 1. is applied in his favor.

Mitigating Condition 6. may be applied where there is "clear evidence of successful rehabilitation". In this case, Applicant has clearly made progress in his rehabilitation. Nevertheless, the record shows that Applicant continually molested his two daughters in a serial fashion for the lengthy period of ten years. This is a shockingly long time to sexually molest children without comprehending the harm being inflicted and recognizing it must be ended. Furthermore, Applicant did not voluntarily cease his molests, and his rehabilitation did not begin until he was apprehended. Therefore, Mitigating Condition 6. is not reasonably appropriate for application at this time, despite Applicant's present state of reform.

The whole person concept has also been considered, and all or part of factors (3); (6); (8); and (9) may be applied in Applicant's favor. Applicant's criminal conduct was not recent, having last occurred fourteen years ago. There is some evidence of rehabilitation; the Applicant is not susceptible to blackmail; and it is not likely the criminal conduct will recur. However, factors (1); (2); (4); (5); and (7) operate against a recommendation for waiver. Applicant's crimes were serious; they were carried out with full knowledge despite Applicant's maturity; and they were motivated by a desire for deviant sexual pleasure.

On balance, after considering the entire record and applying DoD policies, guidance and regulations, it is concluded that this case is controlled by the provisions of 10 U.S.C. 986, and Applicant must be denied clearance. I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive are:

Paragraph 1. Guideline J: AGAINST THE APPLICANT.

Subparas. 1.a.-1.c.: Against the Applicant.

### **DECISION**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant's request for a security clearance.

Burt Smith

Administrative Judge