

DATE: December 18, 2001

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 00-0547

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant sexually abused his minor daughter from approximately May 1990 to October 1991. In April 1992, he pleaded guilty to aggravated sexual battery (a felony) and two counts of non-aggravated sexual battery. His sentence of 15 years in the state penitentiary (adjudged April 1992) for the aggravated sexual battery was suspended and he was placed on supervised probation until mid-1995, when on the recommendation of his probation officer, the probation was changed to unsupervised. Based on 10 U.S.C. §986, Applicant's clearance is denied.

STATEMENT OF THE CASE

On July 26, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to

Executive Order 10865, "*Safeguarding Classified Information Within Industry*," dated February 20, 1960, as amended, and modified, and Department of Defense Directive 5220.6, "*Defense Industrial Personnel Security Clearance Review Program*" (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary finding under the Directive that it is clearly consistent with the national interest to grant Applicant's security clearance and recommended referral to an Administrative Judge to determine whether he should be granted a security clearance.

Applicant answered the SOR in writing on August 16, 2001, and stated he wanted his case decided without a hearing. Applicant received his File of Relevant Material (FORM) consisting of seven items on June 4, 2001. He did not file a response to the FORM. The case was assigned to this Administrative Judge on December 10, 2001.

FINDINGS OF FACT

The Statement of Reasons (SOR) alleges Applicant sexually abused his minor daughter from approximately June 1990 to October 1991 in violation of Guidelines D and J. The SOR also informed Applicant he was disqualified from holding a security clearance under 10 U.S.C. 986 because he had been convicted and sentenced to more than one year

confinement.

In April 1992, Applicant pleaded guilty to one count of aggravated sexual battery (a felony) and to two counts of sexual battery, not-aggravated (misdemeanors). In his answer to the SOR, Applicant admitted all allegations set forth in the SOR. He included with his answer a personal, signed, sworn statement (dated August 16, 2001) explaining the circumstances leading up to his sexual misconduct and a statement from Dr. X, the certified psychologist who had treated him from November 1991 to December 1993. I accept Applicant's admissions, and after a complete and thorough review of the evidence of record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is a 56-year-old retired petty officer of the United States Navy. He retired from active duty in September 1993 after having served terms of service totaling approximately 21 years⁽¹⁾. During his military service he had been granted a secret clearance in 1998 and granted access to sensitive compartmented information (SCI) in 1976. He has been employed by a Department of Defense Contractor since January 1999. The record does not indicate the level of clearance for which Applicant is currently applying, or whether he currently possesses a security clearance.

In December 1988, Applicant's 11-year-old biological daughter began living with him and his then current wife after having lived with Applicant's exwife. In July 1989, Applicant's mother, to whom he was very close, was diagnosed with liver cancer. She died in May 1990. About this time, Applicant began to misinterpret his daughter's "normal, healthy expression of affection toward him. He began fondling her breasts. This pattern of sexual abuse was interrupted in August 1990 when Applicant was deployed overseas. However, the pattern of abuse resumed when he returned home in March 1991. In addition to fondling her breasts, he began fondling her genital area. His abusive behavior eventually culminated in his having oral sex and sexual intercourse with her in October 1991. She was 14 years old at the time. After the incident of oral sex and sexual intercourse, Applicant's daughter reported Applicant to a member of the clergy and he was arrested.

Applicant was initially charged with rape, sodomy, and indecent liberties with a minor. In April 1992, he pleaded guilty to aggravated sexual battery (a felony) and two counts of non-aggravated sexual battery. In August 1992, he was sentenced to 15 years in the penitentiary for the aggravated sexual battery; the confinement sentence was suspended, and he was placed on supervised probation, ordered to pay \$154.00 in costs and required to participate in counseling for sex offenders. He was sentenced to 58 days in jail for the non-aggravated sexual battery; he was released for good behavior after having served 29 days. In mid-1995, pursuant to a recommendation by Applicant's probation officer, his probation was changed from supervised to unsupervised. Because he has been convicted of a sexual offense, Applicant is required to register quarterly with state authorities. He has complied with this requirement.

While Applicant attributes his criminal behavior toward his daughter to stress associated with his mother's final illness and death, and to unresolved issues with his exwife and the daughter's mother, he has accepted full responsibility for his behavior. He does not blame his daughter for behaving in a manner which precipitated his sexually abusive behavior. After the sexual abuse of his daughter was disclosed to authorities, Applicant was forbidden from seeing her, he has since re-established a healthy relationship with his daughter.

Shortly after Applicant's sexual abuse of his daughter was disclosed (November 1991), he began receiving regular treatment from Dr. X, a certified psychologist in the treatment of sexual offenders. Applicant continued to receive weekly treatment from Dr. X until December 1993 when he was released by him as "a treatment success." He has continued in individual therapy with Dr. X on various other family issues including the death of his father and younger brother.

In his letter on Applicant's behalf, Dr. X, stated Applicant made "excellent" progress during treatment and was discharged from treatment with an "outstanding" participation rating. Dr. X indicated Applicant had recently returned for outpatient sessions to deal with issues relevant to the death of his father and brother. Dr. X further indicated the "psychological instability" which had contributed to Applicant's criminal behavior toward his daughter has been under control for many years. Dr. X's recent statement corroborates the progress reports he had prepared during his treatment of Applicant.

POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case by case basis with an eye toward making decisions with reasonable consistency which are clearly consistent with the interests of national security. In making these overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but also in the context of the factors set forth in Section 6.3 of the Directive. In that vein, the Government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to Applicant's lack of security worthiness.

SEXUAL BEHAVIOR

(Guideline D)

The Concern: 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.

Conditions that could raise a security concern and may be disqualifying include:

E2.A4.1.2.2. Compulsive or addictive sexual behavior when the person is unable to stop a pattern of self-destructive or high-risk behavior or that which is symptomatic of a personality disorder.

Conditions that could mitigate security concerns include:

E2.A4.1.3.2. The behavior was not recent and there is no evidence of subsequent conduct of a similar nature.

E2.A4.1.3.3. There is no other evidence of questionable judgment, irresponsibility, or emotional instability.

CRIMINAL CONDUCT

(Guideline J)

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions ⁽²⁾

that could raise a security concern and may be disqualifying include:

- a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;**
- c. Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year;**

Conditions that could mitigate the security concerns include:

- a. The Criminal behavior was not recent;**
- f. There is clear evidence of successful rehabilitation;**

Burden of Proof

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to Applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an Applicant's judgment, reliability, or trustworthiness, Applicant has a heavy burden of persuasion to demonstrate he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518 (1988), "the clearly consistent standard indicates security clearance determinations should err, if they must on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against an Applicant.

CONCLUSION

Having considered the record evidence in accordance with the appropriate legal precepts and guidelines, this Administrative Judge concludes the Government has established its case with regard to Guidelines D and J. In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section 6.3, as well as those referred to in the section dealing with Adjudication Process, both in the Directive.

A security concern is raised by Applicant's criminal, sexual misconduct. A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

Applicant's sexual misconduct is mitigated by its occurrence more than ten years ago. He received sexual offender treatment from Dr. X, a certified psychologist, from November 1991 to December 1993. He was discharged from the treatment program as "a treatment success" in December 1993. During the time he was subject to the requirements of supervised probation, there is no evidence Applicant committed similar acts of sexual misconduct or engaged in criminal misconduct unrelated to the activities for which he was arrested in 1991 and sentenced in 1992. Although he was initially forbidden from having any contact with the daughter whom he sexually abused, he has worked to restore her trust and currently has a normal, healthy relationship with her. He has continued in individual therapy with Dr. X up to the present. There is persuasive evidence Applicant has been rehabilitated, and it is unlikely there will be a recurrence of the sexual misconduct which occurred almost 10 years ago. Guideline D. is concluded for Applicant.

Applicant's sexual misconduct violated state criminal statutes and as criminal conduct, raised a security concern under Guideline J. Applicant's criminal conduct is mitigated under Guideline J because of its occurrence almost ten years ago, and because of evidence Applicant has been rehabilitated. As previously noted, he completed a treatment program for sexual offenders and was discharged from the program as "a treatment success." He has demonstrated excellent insight into his mental and emotional health by recently seeking counseling for stress brought on by the death of his father and a younger brother. Additional evidence of Applicant's rehabilitation is found in Dr. X's statement describing his current mental and emotional state. Finally, evidence of rehabilitation is found in Applicant's statements accepting full responsibility for his sexual abuse of his daughter. Because of his candor in acknowledging his past misconduct, his statement about the current, healthy, appropriate relationship he has established with his daughter is found to be credible. While concluding Guideline J against Applicant, this case is recommended for further consideration of a waiver of 10 U.S.C. §986.

FORMAL FINDINGS

Formal findings as required by Section 3, Paragraph 7, of enclosure 1 of the Directive, are hereby rendered as follows:

Paragraph 1 (Guideline D) AGAINST THE APPLICANT

Paragraph 1.a. For the Applicant

Paragraph 2 (Guideline J) AGAINST THE APPLICANT

Paragraph 2.a. For the Applicant

Paragraph 2.b. For the Applicant

Paragraph 2.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 Applicant's security clearance. I recommend further consideration of this case for a waiver of 10 U.S.C. §986.

John R. Erck

Administrative Judge

1. Appellant had an eight year (approximate) break in service from January 1980 to November 1987.

2. The mitigating conditions for Guideline J are found in the *CRITERIA FOR IMPLEMENTING THE PROVISIONS OF 10 U.S.C. §986 IN ALL DOD DETERMINATIONS FOR ACCESS TO CLASSIFIED INFORMATION*, dated June 7, 2001.