

DATE: December 13, 2001

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 00-0554

## **DECISION OF ADMINISTRATIVE JUDGE**

**JOHN R. ERCK**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Matthew E. Malone, Esq.

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant sexually abused his two minor daughters from approximately 1986 to February 1993. In July 1993, he pleaded guilty to one count of aggravated sexual battery (felony) and one count of indecent sexual liberties (felony). His sentence of ten years confinement in the state penitentiary (adjudged in October 1993) was suspended and he was placed on supervised probation for an indeterminate period. Based on 10 U.S.C. §986, Applicant's clearance is denied.

### **STATEMENT OF THE CASE**

On August 15, 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 September 1, 2001, and asked that his case be decided without a hearing. Applicant received the File of Relevant Material (FORM) consisting of 14 items on October 3, 2001. He did not file a response. The case was assigned to this Administrative Judge on December 10.

### **FINDINGS OF FACT**

The SOR alleged Applicant had engaged in ,and pleaded guilty to acts of sexual misconduct under Guidelines J (Criminal Conduct) and D (Sexual Behavior). 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 his answer to the SOR, Applicant admitted all allegations. I accept his 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 47-year-old "engineer designer" who has worked for his current employer, a DoD contractor since November 1998. Previously, he had worked for DoD contractors from 1978 to June 1995, and from July 1995 to October 1998. His records indicate he was first granted a confidential security clearance in 1978, and that his security clearance was denied, suspended or revoked in February 1995.

Starting in approximately 1986, Applicant began initiating sexual contact with Child A, his eight-year-old biological daughter. After having Child A lie down beside him, he would have her touch his private parts while he rubbed her private parts. He would initiate sexual contact in this manner once or twice weekly at times when his wife was not at home. Appellant continued this sexual abuse of Child A until February 1993. According to his November 1993 signed, sworn statement, there were brief periods of time when Applicant was able to control his impulses and abstain from this abusive behavior but he would always resume the behavior. Although there is no evidence he had sexual intercourse with Child A, he admits sodomizing her on more than one occasion and having her perform oral sex on him on other occasions.

In 1990-1991, Applicant initiated similar sexual contact with Child B, his adopted daughter, who was then six or seven years old. He had sexual contact with Child B with about the same frequency as with Child A until February 1993. The record indicates Child B's vagina and anus had been partially penetrated by Applicant's penis.

In February 1993, Child B attended a puppet show about sexual abuse sponsored by the school she was attending. She realized from watching this show that she had been the victim of sexual abuse, and she later reported Applicant's behavior to a school official.

Applicant was admitted to a psychiatric facility for an evaluation in late February 1993. After three days, he was discharged with a "fair" prognosis and began seeing Dr. X, a Board Certified psychiatrist, for outpatient treatment. Because he was required to leave his home and find another place to live, Applicant moved in with his sister. He continued to receive treatment from Dr. X until at least December 1993.

Applicant was arrested in March 1993 and charged with three counts of aggravated sexual battery (a felony) and one count of indecent liberties (a felony). Two counts of aggravated sexual battery were nolle prosequi in May 1993. In July 1993, he pleaded guilty to one count of aggravated sexual battery and one count of indecent sexual liberties. On October 14, 1993, Applicant was sentenced to be confined in the penitentiary for ten years--seven years for the aggravated sexual assault and three years for the indecent liberties. The sentence of confinement was suspended, and Applicant was placed on supervised probation for an indeterminate period.

Applicant admitted engaging in acts of sexual misconduct with his two minor daughters in a November 1993 signed, sworn statement to the Defense Security Service (DSS).

In December 1993, Dr. X wrote a letter stating Applicant was "capable of being in the home of his wife and children, without posing any risk to his children." Dr. X stated his opinion was based on his evaluations of Applicant during the preceding 10 months.

The record does not indicate whether Applicant continued to receive treatment from Dr. X after December 1993, or whether he received another type of aftercare or follow-up treatment. Nor does the record indicate that Applicant ever violated any of the requirements of his supervised probation. Except for information on his *Security Clearance Application* (SF 86) that he continues to reside at the same address as his wife and children, there is no evidence in the record of Applicant's current mental and emotional health or of his activities since he was allowed to return home in December 1993. He did not include information with his answer to the SOR which would support a request for a waiver of 10 U.S.C. 986, and he did not respond to the File of Relevant Material. The record is totally silent on Applicant's life and activities for almost nine years.

## 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 Applicants lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter:

### **CRIMINAL CONDUCT**

#### **(Guideline J)**

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

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

E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

#### **Conditions that could mitigate security concerns include:**

E2.A10.1.3.1. The criminal behavior was not recent.

### **SEXUAL BEHAVIOR**

#### **(Guideline D).**

The Concern: Sexual behavior is a security concern if it involves a criminal offense, indicates a personality 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.A4.1.2.1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

E2.A4.1.2.2. Compulsive or addictive sexual behavior when the person is unable to a 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.

### **Burden of Proof**

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government established 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 doubt about 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, 531 (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 appropriate legal precepts and factors, this Administrative Judge concludes the Government has established its case with regard to Guidelines J and D. 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 Section E2.2. dealing with the Adjudicative 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 behavior is mitigated by its occurrence more than eight years ago. He received treatment from a Board Certified psychiatrist for at least ten months in 1993, and he has been subject to the requirements of supervised probation for an undisclosed portion of the past eight years. During the time he has been subject to the requirements of supervised probation, there is no evidence Applicant committed similar acts of misconduct or engaged in criminal misconduct unrelated to the activities which lead to his arrest and conviction in 1993. And although he was required to move out of his home and away from his wife and children at the time of his arrest in March 1993, a Board Certified psychiatrist determined he was no longer a danger to his family, and he was allowed to move back home with his family in December 1993. He has continued to live with his family since that time. Guideline D is concluded for Applicant.

Because there is no evidence in the record Applicant has violated the terms of the supervised probation to which he was sentenced in October 1993, it is reasonable to assume his behavior during the past eight years has satisfied the minimum requirement of that probation. Satisfying the minimum requirement of supervised probation does not provide a sufficient basis for recommending further consideration of this case for a waiver of 10 U.S.C. §986. Guideline J is concluded against Applicant.

### **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 J) AGAINST THE APPLICANT**

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. Against the Applicant

#### **Paragraph 2 (Guideline D) FOR THE APPLICANT**

Subparagraph 2..a. For the Applicant

Subparagraph 2.b. For 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 security clearance. I do not recommend further consideration of this case for a waiver of 10 U.S.C. §986.

**John R. Erck**

**Administrative Judge**