

DATE: April 16, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-06337

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Department Counsel

Peregrine D. Russell-Hunter, Department Counsel

FOR APPLICANT

Bruce A. Kent, *Esquire*

SYNOPSIS

In 1995, the Applicant was found guilty of a misdemeanor and sentenced to two years in the Department of Correction which was suspended in lieu of three years supervised probation. The incident occurred prior to December 1989, when the Applicant was yet in high school. 10 U.S.C. § 986 directed a clearance must be denied. A waiver of 10 U.S.C. 986 is recommended.

STATEMENT OF THE CASE

On September 27, 2001, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On October 16, 2001, the Applicant answered the SOR and requested a hearing. The case was assigned to me on January 4, 2002. A Notice of Hearing was issued on January 28, 2002, scheduling the hearing which was held on February 19, 2002. The Government's case consisted of four exhibits (Gov Exs). The Applicant relied on his own testimony, the testimony of one other witness, and eight documents. (App Exs) The record was held open to allow the Applicant to submit additional documents. Following the hearing, a single submission, containing multiple pages, was received. Department counsel having no objection to its admission, the submission was admitted as App Ex I. A transcript (tr.) of the hearing was received on February 28, 2002. On March 8, 2002, the Applicant's Statement of the Case was received and considered.

FINDINGS OF FACT

The SOR alleges criminal conduct (Guideline J). The SOR alleged in 1994, the Applicant was arrested for child abuse, a felony. The Applicant denies the allegation.

The Applicant is 31-years-old, has worked for a defense contractor since February 2000, and is seeking to obtain a security clearance. His work performance is outstanding for which he received a special achievement award. (App Ex H)

The Applicant's mother ran a day care business from her home. The Applicant would, at times, be temporarily left to watch the children. Sometime between September 1988 and December 1989, (Gov Ex 4, p.2) when the Applicant was between 18 and 19 years old, he masturbated in front of a child⁽²⁾ while temporarily in charge of the day care, and when the other children were napping. (Gov Ex 2, p. 2) The Applicant was in high school during this single occurrence.

In September 1994, the Applicant was charged with Child Abuse: Custodian, a felony. The state amended the charge to indecent exposure, a misdemeanor,⁽³⁾ which, under state law, is not a crime involving moral turpitude. January 1995, the case proceeded with an agreed Statement of Facts. After pleading not guilty, the Applicant was found guilty and sentenced to two years in the Department of Corrections (suspended in lieu of three years supervised probation), fined \$255.00, and ordered to receive counseling. (Gov Ex 4) The Applicant completed all the terms and conditions of his sentence. In March 1996, the Applicant's motion for reconsideration of sentence was granted and the entry of judgment was stayed. In December 1996, his probation was terminated early. (App Ex A)

Between August 1994 and August 1996, the Applicant began to receive psychiatric treatment. (App Exs F, I) According to the court psychiatrist who reviewed his treatment, the Applicant "made good use of his psychotherapy." (App Ex I) Some of the underlying issues related to his indecent exposure included anger, loneliness, and significant stress which he channeled through his sexual behavior. (App Ex I) His treatment progressed to the point where the Applicant no longer posed a threat of repeating his behavior in the future. He has taken appropriate steps to reform his behavior.

The Applicant grew up in a dysfunctional family with difficult parent/child relationships. At age 16, he attempted suicide because he was unhappy about his relationship with his mother. (App Ex I) He has worked hard to deal with family issues and move beyond them. (App Ex G) He is married, a caring, patient father with a step child and another child due in September 2002. He believes his most important role is to be a father. He is a loving, caring person who has turned his life around. In 1993, when he met his wife he was working in a low paying warehouse job, living with his parents. In 1996, they married and he worked while she got her degree. Then he got his degree going to night school first and then full time for the last two years. Between July 1995 and May 2000, the Applicant attended college graduating *cum laude* in May 2000, with a Bachelor of Science degree. (App Ex E) In October 1999, they purchased their home. The Applicant spends his time remodeling the house, and getting the baby's room ready. Within the last 10 years he has gotten himself together both morally and spiritually.

POLICIES

The Adjudicative Guidelines in 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 determinations that are clearly consistent with the interests of national security. In making 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 in the context of factors set forth in section E 2.2.1. of the Directive as well. 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 an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

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 security concern and may be disqualifying include:

- b. A single serious crime or multiple lesser offenses;
- 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. [\(4\)](#)

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent;
- b. The crime was an isolated incident;
- f. There is clear evidence of successful rehabilitation;
- g. Potentially disqualifying conditions c. and d., above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver.

BURDEN OF PROOF

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the Applicant who must remove that doubt and establish his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into 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, the Applicant has a heavy burden of persuasion to demonstrate that 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 that 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 the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under Guideline J, (Criminal Conduct). Under Guideline J, the security eligibility of an applicant is placed into question when that applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness. In January 1995, the Applicant was found guilty of a single misdemeanor--indecent exposure.

Although a misdemeanor, it is still a serious crime and disqualifying condition (DC) b. [\(5\)](#) applies. The Applicant was sentenced to two years in the Department of Correction, which was suspended. Since the sentence included imprisonment for a term exceeding one year, DC c. [\(6\)](#) applies.

The underlying incident leading to the single conviction occurred prior to December 1989--more than 12 years ago at a time the Applicant was still in high school. The Applicant has been arrested only one time. Mitigating Condition (MC) # a. [\(7\)](#) and b. [\(8\)](#) apply. The Applicant has taken appropriate steps to reform his behavior and preclude a recurrence of his inappropriate conduct. He attended counseling for two years and, according to the court psychiatrist who reviewed the treatment, made good use of his psychotherapy. The Applicant was channeling anger, loneliness, and significant stress through his inappropriate sexual behavior. The counseling progressed to the point where the Applicant no longer posed a threat of repeating his behavior in the future.

The Applicant acknowledged he made a poor choice of actions, regrets the incident, feels remorse, and is aware of the

consequences for his actions. I had ample opportunity to evaluate the demeanor of Applicant, observe his manner and deportment, appraise the way in which he responded to questions, assess his candor or evasiveness, read his statements, listen to his testimony, and watch the interplay between himself and those around him. It is my impression that Applicant's expressions of regret have the ring of truth.

The Applicant's work performance has been excellent and he has been recognized for his outstanding work. The incident appears to be an aberration, is isolated, occurred more than 12 years ago, and has not been repeated. The Applicant demonstrated good judgment in seeking professional counseling. He has worked hard to deal with family issues and move beyond them. He is married, a loving, caring, patient father with a step child and a child due soon. He considers his most important role is to be a father. He has turned his life around. He worked while his wife got her degree and then he got his degree, *cum laude*, while first attending night school and then attending full time. The Applicant is a home owner who spends his time remodeling the house. Within the last 10 years he has gotten himself together both morally and spiritually. I am confident such conduct will not recur. The Applicant has markedly changed his life between now--at age 31--and when the indecent exposure occurred--while the Applicant was still in high school. There is clear evidence of rehabilitation. C f. [\(9\)](#) applies. I find for the Applicant as to SOR subparagraph 1.a.

The provisions of 10 U.S.C. 986 (P.L. 106-398) apply to the Applicant because he was convicted in State court and sentenced to imprisonment for a term exceeding one year, even though

the imprisonment was suspended. I find against the Applicant as to SOR subparagraph 1.b. Because of the significant changes in the Applicant, I recommend further consideration of this case for a waiver of 10 U.S.C. 986.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

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 (Criminal Conduct): AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: 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 or continue a security clearance for the Applicant.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.
2. The incident occurred when the child was in first to third grade.
3. Under state law the maximum punishment for indecent exposure was imprisonment for not more than three years or a

fine of not more than \$1,000.00. (App Ex B)

4. Under the provisions of 10 U.S.C. 986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts martial, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concerned, may authorize a waiver of this prohibition.

5. DC b. A single serious crime or multiple lesser offenses.

6. DC 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.

7. MC a. The criminal behavior was not recent. (E2.A10.1.3.1.)

8. MC b. The crime was an isolated incident. (E2.A10.1.3.2.)

9. MC f. There is clear evidence of successful rehabilitation.