

DATE: August 28, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-17357

DECISION OF ADMINISTRATIVE JUDGE

JOSEPH TESTAN

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The fact that applicant was convicted of multiple crimes and sentenced to multiple prison terms exceeding one year precludes him from receiving a security clearance under 10 U.S.C. 986. Clearance is denied.

STATEMENT OF THE CASE

On December 21, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to applicant which detailed 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 and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant responded to the SOR in writing on January 7, 2002, and elected to have his case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's written case (FORM) on or about April 10, 2002. Applicant filed a response to the FORM on May 15, 2002. Department Counsel did not object to applicant's response. The case was assigned to me on May 31, 2002.

FINDINGS OF FACT

Applicant is a 42 year old employee of a defense contractor.

In December 1998, applicant was charged in State A with (1) Child Abuse by a Parent, (2) two counts of Rape, second degree, (3) two counts of Sex Offense, third degree, (4) two counts of Sex Offense, fourth degree, and (5) two counts of Assault, second degree. These charges were based upon criminal and sexually perverted conduct applicant engaged in with his minor daughter in December 1996. He pleaded guilty to one count of Sex Offense, fourth degree, and one count of Assault, second degree. In March 2000, he was sentenced to a total of eight years in jail, with all but eighteen months suspended. Applicant spent more than one year in jail, part of which was spent in a work release program.

In January 1999, applicant was indicted in State B on the following charges involving the same minor daughter: (1) Statutory Rape, (2) Felonious Incest, and (3) Indecent Liberties with a Child. These charges were based upon criminal and sexually perverted conduct occurring between 7/1/98 and 8/30/98. Applicant pleaded guilty to Felonious Incest and Indecent Liberties with a Child, and in August 2000, he was sentenced to two terms of 21 to 26 months in jail. The jail time was suspended for five years pending the successful completion of five years of supervised probation. Applicant was also ordered to pay restitution of \$4,500.00 and court costs of \$131.00.

Despite his guilty pleas, applicant denies that he ever engaged in criminal or sexually perverted conduct with his minor daughter. In a signed, sworn statement that he gave to the Defense Investigative Service (DIS) in September 2001, he stated the following:

"I plea bargained in both jurisdictions . . . because I weighed my options and found that it was the lessor of two evils. I did not want to plead my case in front of a jury of 12 when it would have been my word against my teen-age daughter. I knew sentiment would be bias in her favor. My attorney also told me I would receive no jail time if I accepted the plea bargain, which turned out not to be the case."

At the time his criminal charges were pending, applicant was serving in the military reserves. In a letter to a superior, applicant characterized the criminal proceedings he was involved in as "domestic in nature," apparently in an attempt to remain eligible for a promotion. Applicant's description of the court proceedings was clearly misleading and was designed to conceal the true nature of the matter before the court. This intentional misrepresentation to his military superiors constitutes a violation of 18 U.S.C.1001, a felony.

The October 9, 2001 memorandum that applicant attached to his SOR answer rebuts the allegation that he was administratively discharged from the military reserves in June 2001.

A January 16, 2002 letter from one of applicant's supervisors was attached to applicant's SOR answer. In it, the supervisor describes applicant as an "outstanding professional" with "the highest moral standard" who is very deserving of a security clearance.

POLICIES

Enclosure 2 of the Directive sets forth Guidelines (divided into conditions that could raise security concerns and conditions that could mitigate security concerns) which must be followed by the Administrative Judge. Based on the foregoing Findings of Fact, the following Guidelines are applicable:

Criminal Conduct

Disqualifying Conditions

1.2.1: Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

1.2.2: A single serious crime or multiple lessor offenses.

Mitigating Conditions

None.

Sexual Behavior

Disqualifying Conditions

1.2.1: Sexual behavior of a criminal nature.

1.2.4: Sexual behavior which reflects lack of discretion or judgment.

Mitigating Conditions

None.

Personal Conduct

Disqualifying Conditions

None.

Mitigating Conditions

None.

CONCLUSIONS

The evidence establishes that following investigations in two different states, applicant was charged with and convicted of serious crimes involving the sexual abuse of his minor daughter. The evidence further establishes that the court in each state sentenced applicant to a jail term exceeding one year. Each sentence, standing alone, bars applicant from receiving a security clearance under 10 U.S.C. 986.

Even in the absence of 10 U.S.C. 986, applicant would not be eligible for a security clearance at the present time. His criminal and sexually perverted conduct with his minor daughter raises too many doubts about his judgment, reliability and trustworthiness under Guidelines D and J, and his intentional misrepresentation of material facts in his letter to his military superiors raises too many doubts about his judgment, reliability, trustworthiness, honesty, and candor under Guideline E. Applicant has not only failed to remove these doubts, he has compounded them by denying he engaged in any inappropriate conduct with his daughter and by denying he intentionally tried to mislead his military superiors. (U)

In view of the foregoing, it is not clearly consistent with the national interest to grant applicant a security clearance at the present time.

FORMAL FINDINGS

PARAGRAPH 1: AGAINST THE APPLICANT

PARAGRAPH 2: AGAINST THE APPLICANT

PARAGRAPH 3: 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 applicant.

Joseph Testan

Administrative Judge

1. Applicant's denials were not credible. And, with respect to his felony convictions in State B, he is precluded by law from arguing his innocence in this DOHA proceeding.