

DATE: May 8, 2002

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 01-18069

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant pleaded guilty to a criminal (felony) sexual misconduct charge arising from an encounter with his 14-year-old stepdaughter in 1986. Since being incarcerated for 18 months and serving 5 years probation, he has lived an exemplary life. He is the owner and chief executive officer of a company he founded in 1993. He has an outstanding reputation for honesty and integrity amongst his professional colleagues and associates and has not had any further problems with law enforcement authorities. The security concern raised by his recent marriage to a Russian citizen, whose in-laws reside overseas, is mitigated by Applicant's assurances none of these individuals are currently employed by a foreign government. Because he was sentenced to imprisonment for a term which exceeded one year, Applicant is ineligible for security clearance unless granted a waiver by the Secretary of Defense, See 10 U.S.C. 986.

STATEMENT OF THE CASE

On October 21, 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 Personal 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 a security clearance for Applicant and recommended referral to an Administrative Judge to determine whether a security clearance should be granted, denied, or continued.

Applicant answered the SOR in writing on December 13, 2001, and stated he wanted his case decided without a hearing. Applicant received his File of Relevant Material (FORM) consisting of eight items on February 6, 2002. He filed his response on February 15, 2002. The case was assigned to this Administrative Judge on March 14, 2002.

RULING ON APPLICANT'S OBJECTION

In his response to the File of Relevant Material, Applicant objected to the admission of Item 8, summaries of interviews

conducted by a police investigator. These summaries are printed on plain paper with a police department letterhead, but they are not signed by the investigator or by the witness, and there is no indication the interviews were conducted under oath. However, these summaries appear to have been "compiled or created in the regular course of business" (Section E3.1.20.) and are admissible. The missing indicia of authenticity goes to weight to be accorded Item 8, not to its admissibility. Applicant's objection to Item 8 is overruled.

FINDINGS OF FACT

The Statement of Reasons (SOR) alleges Applicant was charged with and pleaded guilty (in 1986) to: rape of a child by force (a felony), indecent assault and battery on a child under age 14 (a felony), indecent assault and battery on a child over 14 (a felony), and six counts of misdemeanor firearms possession. The SOR also alleges Applicant is subject to foreign influence because his wife is a Russian citizen, residing in the United States, and his in-laws are Russian citizens, residing in Russia. Applicant denies with an explanation the rape allegation, and admits with an explanation, the indecent assault allegation. He admits with an explanation the firearms allegation, and he admits with an explanation the foreign influence allegations. I accept Applicant's admissions and explanations, 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 58-year-old engineer who is currently the owner and chief executive officer of a company he started in November 1993. Before receiving his Ph.D in 1981, he had served in the U. S. military (on active duty) from July 1969 to March 1972, receiving a commission during this term of service. Applicant remained in the military reserves until February 1979. He worked for a U.S. military research laboratory from April 1976 to December 1979, and for a DoD contractor from 1979 to 1981. He received a secret clearance in 1979, and a top secret clearance in 1981. He recently married his second wife, a Russian citizen.

The unfortunate encounter which precipitated the SOR allegations and changed Applicant's life forever occurred in 1986 when Applicant was married to his first wife. His wife had a son and a 14-year-old daughter from a previous marriage. Because of health-related problem (Addison's disease), his wife was not available for a physical relationship with Applicant and did not have the time, energy or interest to provide structure and discipline for her daughter--whom Applicant has described as "physically mature for her age." After learning she was associating with older friends and was becoming inappropriately involved with an older man, Applicant intervened and attempted to restrict his step-daughter's activities. It was during this time while his wife was absent for a few days that Applicant accepted his step-daughter's invitation to shower with her⁽¹⁾. Nothing happened during this common shower; there was no sexual intercourse. However, Applicant's stepdaughter later reported to her boyfriend that she had had "sexual experiences" with Applicant. The boyfriend reported to the school, and the school reported to law enforcement officials. Applicant was arrested and indicted on the charges set forth in the SOR. On advice of his attorney Applicant pleaded guilty to a charge of "Rape or abuse of a child" (See Item 7). He was sentenced to two years incarceration, but was released after serving 18 months. And after being released, Applicant was placed on supervised probation for five years and ordered to have ongoing psychiatric evaluation and treatment.

Near in time to Applicant's arrest, the police searched his home and discovered he was in possession of several unregistered firearms. Applicant has explained he brought the firearms from another state which had a much more lenient approach to gun possession and registration. He describes these weapons as family heirlooms which he never intended to use. Because he was starting a new company and working very long hours, he did not take the time to register them. The misdemeanor firearms charges were added to the rape and indecent assault charges; however, there is no indication in the court records Applicant was ever required to enter a plea to these charges.

When Applicant and his wife divorced in 1988, his ex-wife was awarded the house, both cars, the furniture, and many items of personal property that had been in Applicant's family for years. She had told Applicant several times before the sexual abuse charges arose that the house was hers, the cars were hers and the furniture was hers, and he had better not try and fight her for them. Applicant believes his ex-wife and stepdaughter conspired to involve him in the misconduct which resulted in his incarceration and in her obtaining all of the family assets. Applicant had to rebuild his life from the ground up when he was released from incarceration.

Applicant has stated in at least two of his submissions that he has been evaluated and found not to have a character defect. However, there is no professional evaluation of Applicant in the file.

Applicant married his current spouse, a Russian citizen, on a date subsequent to August 1999⁽²⁾. They met on the Internet, and began corresponding by e-mail in April 1997. They spent two weeks together in October-November 1997 when she visited the United States. She came to the U.S. on a student visa in June 1998 and is currently working toward becoming a certified public accountant. Applicant's mother-in-law is a retired teacher and his brother-in-law is a commercial artist; both reside in Russia. Applicant plans to bring his mother-in-law and brother-in-law to the United States "as soon as circumstances permit." Applicant's father-in-law is a retired ballet dancer and resides in Germany. None of these individuals is currently employed by the Russian Government. Because of language barriers and distance, Applicant has had minimal contact with his in-laws. Since arriving in the United States, Applicant's wife has graduated from a U.S. university and is now employed in the profession for which she has been trained.

Applicant receives the highest accolades for honesty and integrity from his current, professional associates. The attorney who has served as outside corporate counsel for Applicant's company since 1997, described Applicant as possessing a strong sense of ethics, as taking his fiduciary duties very seriously, as being very focused on protecting confidential information and as having a strong commitment to community as evidenced by his operating a successful mentoring/internship program for local high school students. An individual who has known Applicant for 18 years and who had worked with him when they worked for the same employer more than 15 years ago remembered Applicant as someone who very patriotic and who was always conscientious in meeting security guidelines. A fellow scientist and entrepreneur considers Applicant to be extremely analytical and has observed him taking his abstract ideas into projects in "inventive ways."

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 decision 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.

CRIMINAL CONDUCT⁽³⁾

(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:

- a. 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;

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent;
- b. The crime was an isolated incident;
- d. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;

f. There is clear evidence of successful rehabilitation.

FOREIGN INFLUENCE

(Guideline B)

The Concern: A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

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

E2.A2.1.2.1. An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country.

Conditions that could mitigate the security concerns include:

E2.A2.1.3.1. A determination that the immediate family member(s) are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the persons involved and the United States.

Burden of Proof

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government has 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. When 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 B. 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 adjudicative process, both in the Directive.

A security concern is raised by Applicant's criminal conduct, i.e., his guilty plea to the charge of "rape or abuse of a child." A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

Applicant's criminal conduct is mitigated by its occurrence 16 years ago (E2.A10.1.3.1.). It was an isolated event (E2.A10.1.3.2.) that occurred under circumstances that have not recurred in 16 years and are not likely to recur in the future (E2.A10.1.3.4). And there is evidence of Applicant's successful rehabilitation. Since his conviction and incarceration 16 years ago, Applicant has put the experience behind him and gone on to lead a productive life. Favorable consideration has been given to Applicant's explanation of the circumstances that preceded and precipitated his criminal conduct. He provides a plausible account of a marriage that was dissolving and of a vengeful wife intent on acquiring all of the marital assets by whatever means. While Applicant was the adult and cannot absolve himself of responsibility by claiming it was his 14-year-old stepdaughter who initiated the "common shower," the circumstances surrounding the

event are still a relevant consideration in assessing his overall culpability. Since that event, Applicant has accepted responsibility for his actions; he pleaded guilty to a charge arising from that misconduct, he served 18 months in prison and five years on probation, he re-established himself as an honest and productive member of society; and he has been consistently honest and forthright in providing information about the event--both when he completed the *Security Clearance Application* and when he provided a signed, sworn statement to the DSS. Were it not for the ineligibility (for a security clearance) assigned to him by 10 U.S.C. 986, Guideline J could be decided for Applicant.

A security concern is raised by the Russian citizenship of Applicant's wife and in-laws. When an individual's immediate family are not citizens of the United States or may be subject to duress, a situation may arise where the individual could be influenced to compromise classified information.

Although Applicant's wife is not yet a U.S. citizen, she has received her education in the United States, and has obtained professional employment. Applicant's mother-in-law and brother-in-law are not currently employed by the Russian government and have expressed an interest in immigrating to the United States. There is no evidence indicating Applicant's in-laws are in a situation where they could be exploited and influence Applicant to compromise classified information (E2.A2.1.3.1.). Guideline B is concluded for 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

Paragraph 1.a. For the Applicant

Paragraph 1.b. Against the Applicant

Paragraph 2 (Guideline B) FOR THE APPLICANT

Paragraph 2.a. For the Applicant

Paragraph 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 recommend further consideration of this case for waiver of 10 U.S.C. 986.

John R. Erck

Administrative Judge

1. Although Item 8 includes additional allegations of sexual abuse, the substance of these allegations is rebutted by Applicant's denial, by the manner in which they were disposed of by the district attorney, and by Applicant's unblemished record except for this incident.
2. When he was interviewed by the Defense Security Service (DSS) and provided a signed, sworn statement in August 1999, he was still attempting to resolve her immigration status with Russian authorities (Item 5). They were not married; however, in written materials submitted after the SOR was issued, Applicant indicates the woman is now his wife.
3. See Memorandum dated June 7, 2001, implementing the restrictions on the granting or renewal of security clearances as mandated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, 10 U.S.C. 986. The disqualifying and mitigating conditions for Guideline J are taken from the implementing provisions of 10 U.S.C. 986.