DATE: June 30, 2003

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 01-19823

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Edward J. McMahon, Esq.

SYNOPSIS

Circa 1979, Applicant committed criminal assault and battery of a sexual nature on two minor females acquainted with his daughter. Adjudged guilty of two counts of indecent assault and battery upon a child under the age of 14, Applicant was sentenced in August 1984 on each of two counts to two years in jail, suspended to run concurrently, and to five years probation with psychological treatment and payment of restitution. Following a November 1986 security clearance hearing, Applicant was allowed to retain his security clearance, a decision affirmed on appeal. There has been no recurrence of the sexual misconduct, confirming he has been successfully rehabilitated. However, under 10 U.S.C. § 986, the Department of Defense is precluded from renewing a security clearance to individuals who have been convicted and sentenced to a term of imprisonment of more than one year. Clearance is denied with a recommendation that this case be considered further for a waiver of the statutory disqualification.

STATEMENT OF THE CASE

On August 22, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4 and the implementation of Title 10, Section 986 of the United States Code), issued a Statement of Reasons (SOR) to the 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 his security clearance. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR alleged criminal conduct (Guideline J) and sexual behavior (Guideline D) because of his indecent assault and battery on two minor females under age 14 in 1977/78, for which crimes he admitted sufficient facts and was adjudged guilty in August 1984. Applicant's criminal conviction of two counts, for which he was sentenced to two years in prison, suspended, and five years probation, allegedly disqualified him from having a security clearance granted or renewed pursuant to Title 10, Section 986 of the United States Code.

On October 7, 2002, Applicant responded to the SOR, and requested a decision based on the written record. By letter dated December 10, 2002, counsel for Applicant requested a hearing before a DOHA Administrative Judge. The case was assigned to me on February 12, 2003, and pursuant to formal notice dated arch 4, 2003, a hearing was scheduled for March 27, 2003.

At the hearing, Applicant moved for entry of an order authorizing the renewal of his security clearance without the necessity for a hearing or administrative decision on the basis the factual and legal issues presented by the August 22, 2002, SOR had already been the subject of a favorable adjudication by DOHA in 1986 (affirmed on appeal in August 1987).[(1)] His motion was denied and the hearing was ordered to proceed. Under E3.1.25. of Department of Defense Directive 5220.6, an administrative judge is required to issue a written clearance decision in a timely manner setting forth pertinent findings of fact, policies, and conclusions as to the allegations in the SOR, and determining whether it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. The administrative judge is not empowered under the Directive to authorize continuation of Applicant's clearance without a hearing (or administrative determination based on the written record). Furthermore, while the specific conduct alleged to be security disqualifying under guidelines J and D was the subject of the earlier DOHA adjudication, the implementation of 10 U.S.C. § 986 within the Department of Defense, incorporated into Guideline J as disqualifying condition c., requires reevaluation of security eligibility in those cases falling within the statute.[(2)] The statutory disqualification under 10 U.S.C. § 986 is a legal issue that was not present in the prior adjudication. Under DOHA Operating Instruction (OI) No. 64, dated July 10, 2001, the administrative judge is responsible for initial resolution as to whether or not 10 U.S.C. § 986 applies to the facts of a case. A motion filed by Applicant as to the nonapplicability of 10 U.S.C. § 986 was taken under advisement pending review of all the evidence entered into the record at the hearing.

The Government submitted into evidence five documents, which were accepted into the record without any objections. Applicant's case consisted of 10 exhibits, all admitted, his testimony, character reference testimony from a longtime coworker, and expert witness testimony from the clinical psychologist who treated Applicant from July 1984 to late 1986 for regressive pedophilia. DOHA received the transcript of the hearing on April 7, 2003.

FINDINGS OF FACT

The SOR alleges criminal conduct and sexual behavior. In his Answer, Applicant admitted the original criminal charges and initial conviction on two counts of indecent assault and battery on a child under age 14 based on admission to significant facts, but denied the applicability of 10 U.S.C. § 986 as his convictions were revoked by the court in January 1986 and dismissed in January 1991. Applicant cited his successful rehabilitation as mitigating of the sexual behavior concerns and as meriting consideration of his case for a waiver should 10 U.S.C. § 986 apply. After a complete and thorough review of the evidence of record, and upon due consideration of the same, I make the following findings of fact:

Applicant is a 60-year-old senior systems engineer, who has been employed by the same defense contractor since April 1973. He has held a secret security clearance since April 1973 for his duties in the field of microwave engineering for submarine periscopes and optronic systems.

Sometime in the 1978/79 time frame, Applicant engaged in sexual conduct with two minor females (then ages 7 and 10) who resided in his neighborhood.[(4)] In June 1984, Applicant was arrested by the state police for two counts of felony indecent assault and battery upon a child under age 14 for conduct alleged to have occurred in July 1979 and August 1979, respectively, and one count of assault with intent to commit a felony in August 1983. In late August 1984, Applicant was adjudged guilty of both counts of indecent assault and battery upon a child under age 14, having admitted sufficient facts, and sentenced to concurrent prison terms of two years on each count, suspended, and he was placed on five years probation with conditions, including continuation of the psychological counseling he had been receiving since July 1984. The charge of assault with intent to commit a felony in August 1983 was nolle prossed in October 1984.

At the advice of his attorney, Applicant in early July 1984 began individual and couples counseling with a licensed clinical psychologist with expertise in treating sexual offenders. Applicant presented as rigid and defensive and "married to his work," which contributed to a lack of interpersonal skills. The psychologist diagnosed Applicant as a regressive pedophile who was not sexually dangerous but needed a structured treatment approach, which included aversion

therapy.[(5)] For about a year, Applicant attended individual therapy sessions on at least a weekly basis in treatment of his sexual disorder, and several sessions with his spouse to improve communication in the marital relationship. Circa summer 1985, his individual therapy declined to twice per month with a further decrease in frequency later that fall. By that time, Applicant had made substantial progress in his therapy. He recognized, and accepted responsibility for, the harm he caused the two girls, had learned to deal more openly with his problems, and had developed appropriate strategies for relapse prevention.

Applicant's August 1984 conviction was well-publicized in the local newspaper and known to coworkers. Applicant did not allow his legal difficulties to impact his work performance, and he continued to contribute to his employer and the defense of the United States.

On November 7, 1985, DOHA (then known as the Directorate for Industrial Security Clearance Review or DISCR), issued an SOR to Applicant citing criminal conduct and poor judgment concerns because of Applicant's August 1984 conviction of two counts of indecent assault and battery upon a child under age 14. At the request of Applicant, his treating psychologist provided DOHA on November 17, 1985, a summary of his treatment of Applicant. Citing Applicant's active commitment to therapy, his openness to new ideas, and the changes made by Applicant in the past year, the clinician opined the likelihood of recurrence of the sexual misconduct was nil. On February 20, 1986, DOHA issued a corrected SOR to indicate that the conduct alleged to be security disqualifying was not only criminal, but also "acts of sexual perversion."

While the issue of Applicant's security clearance eligibility was pending before DOHA, the state district court judge held a hearing on a motion filed by Applicant to revise and revoke his sentence based on the favorable prognosis rendered by his psychologist. After hearing testimony from the psychologist concerning Applicant's progress in sex offender therapy, the judge allowed the motion in January 1986, and revoked the finding of guilty as to both counts. In his order, the judge indicated the findings of guilty were still warranted, and he continued the case without a finding to mid-January 1989, extending his probationary term with all conditions of probation to remain the same, but with fines and surfines converted to court costs.

In November 1986, a DOHA Hearing Examiner conducted a hearing as to Applicant's continued suitability for access to classified information. Testimony was taken from Applicant's treating psychologist, who again rendered his professional opinion that Applicant was not likely to engage in inappropriate sexual contact with minors in the future. The security officer at Applicant's employment testified to Applicant's integrity and ability to properly handle classified information and to his opinion that the sexual incidents with minors were an aberration in Applicant's record of otherwise outstanding conduct. The vice president for human relations at the company testified to having recommended to other company officials that Applicant be retained in light of his longstanding superior, dedicated and trustworthy, reliable performance on the job. Following his review of the facts in light of the pertinent adjudicative criteria, the Hearing Examiner concluded Applicant was not vulnerable to blackmail because his criminal conduct--which last occurred in 1979--was a matter of public record and known to those close to him. He further concluded Applicant had been successfully treated for his regressive pedophilia and was not likely to repeat the behavior which occurred in 1978 and 1979 ("there is a probability of rehabilitative success"). On December 8, 1986, the Hearing Examiner issued a determination favorable to Applicant, incorporating the findings and conclusions set forth in a bench decision of November 5, 1986.[(6)] The Hearing Examiner's decision was affirmed by the DOHA Appeal Board in a decision of April 17, 1987, and Applicant was allowed to retain his secret security clearance.

Applicant continued to perform his defense-related work in a professional manner without incident, serving as custodian for a classified storage container. In conjunction with a periodic reinvestigation into Applicant's continued security eligibility, Applicant executed a security clearance application (SF 86) in December 2000. Applicant responded affirmatively to whether he had ever been convicted of a felony offense, listing two charges of indecent assault and battery ("Dates of offense were in 1977 and 1978. Charges were not made until 1984. On January 2, 1986, the court allowed a motion to revoke guilty findings and revise to continued without a finding until end of probation on January 18, 1991. After successfully completing probation, the offenses were dismissed. Status is closed.").

On August 22, 2002, DOHA issued an SOR to Applicant alleging criminal conduct and sexual behavior concerns because of the two counts of indecent assault and battery on a child under age 14, for which he was convicted in 1984

and sentenced on each count to concurrent prison terms of two years, and five years probation with psychological treatment and payment of restitution. These convictions allegedly disqualified Applicant from having his clearance renewed because of 10 U.S.C. § 986. Following receipt of the SOR, Applicant sought an evaluation by the clinical psychologist who had treated him for regressive pedophilia for 15 to 18 months on a regular basis in 1984/85. During his session in August or September 2002, the psychologist discussed with Applicant stresses at home and work, including concerns about the potential loss of security clearance. In the expert opinion of the psychologist, Applicant continues to demonstrate that he has profited from his therapy and he indicated Applicant is at a minimal risk to ever reoffend.

Regarded at work as an expert in microwave engineering design, Applicant has detailed knowledge of the essential components and requirements of the photonics system he has been working on for the company's military customer since 1995. He has demonstrated his ability to handle classified information appropriately, consulting on occasion with the security department to establish good security practices at the facility. Applicant's second-level supervisor at work, who has known Applicant for about 29 years, has limited, secondhand knowledge of the conduct which led to the criminal charges in 1984. He has at all times observed Applicant to behave in a professional manner and to exercise "the best judgment in matters of security and company policy."

Applicant has not been involved in any improper sexual contact with a minor since 1979 or been arrested for any offense since the indecent assault charges in 1984. He is friendly with his neighbors, and is involved in his community, serving as an usher at his church.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. See Directive 5220.6, Enclosure 2, Section E2.2.4.

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

Criminal Conduct

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. Allegations or admission of criminal conduct, regardless of whether the person was formally charged

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

Conditions that could mitigate security concerns include:

a. The criminal behavior was not recent

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.[(7)]

Sexual Behavior

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. Sexual orientation or preference may not be used as a basis for or a disqualifying factor in determining a person's eligibility for a security clearance (E2.A4.1.1.)

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

Sexual behavior of a criminal nature, whether or not the individual has been prosecuted (E2.A4.1.2.1.)

Sexual behavior . . . which reflects lack of discretion or judgment (E2.A4.1.2.4.)

Conditions that could mitigate security concerns include (E2.A4.1.3.):

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

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

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

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 its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion 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." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. See Enclosure 2 to the Directive, Section E2.2.2.

CONCLUSIONS

Having considered the evidence of record as a whole, in light of the appropriate legal precepts and factors and after

consideration of the factors enumerated in Section 6.3. and those referred to in Section E2.2. dealing with the Adjudicative Process, I conclude the Government has established its case with regard to guidelines J and D.

In the late 1970s, Applicant engaged in criminal sexual conduct with two minor females who lived in his neighborhood. After admitting to sufficient facts, Applicant was adjudged guilty in late August 1984 of two counts of indecent assault and battery on a child under age 14 for conduct committed in 1979,[(8)] and sentenced to concurrent two year prison terms, and placed on five years probation with conditions (restitution and counseling). Having betrayed the trust of young children, Applicant bears a particularly heavy burden to demonstrate he is worthy of handling sensitive information vital to our Nation's security. His conduct falls with the security concerns reflected in Guideline D (E2.A4.1.2.1. sexual behavior of a criminal nature and E2.A4.1.2.4. sexual behavior which reflects a lack of discretion or judgment) and Guideline J (a. allegations or admission of criminal conduct, b. a single serious crime or multiple lesser offenses, and c. conviction in a Federal or State court, including a court-marital of a crime and sentenced to imprisonment for a term exceeding one year).

In mitigation, Applicant began counseling in July 1984 with a licensed clinical psychologist with expertise treating sex offenders. He participated in individual and couples therapy over the next 18 months, making significant progress. The clinical psychologist testified at a January 1986 hearing on Applicant's motion to revise and revoke [his sentence] that Applicant was at minimal risk to reoffend. At a subsequent hearing before DOHA to revoke Applicant's security clearance in November 1986, the clinician assessed the probability of the criminal sexual misconduct recurring at "nil." Persuaded by what he characterized as "compelling testimony" from the psychologist, the Hearing Examiner found "a probability of rehabilitative success," and he issued a determination favorable to Applicant, which was affirmed on appeal.

Subsequent events and the passage of time have confirmed the success of Applicant's rehabilitation. There has been no recurrence of any improper sexual physical with minors since 1979 or of any attempt to contact his victims since 1983. [(9)]

Applicant has continued to contribute significantly to the defense effort at work, and he has maintained appropriate social interaction with family, coworkers, and neighbors. During a recent reevaluation in September 2002, the psychologist who treated Applicant in 1984/85 saw evidence of effective coping by Applicant with the stress caused by work and family issues, including the potential loss of his security clearance. At Applicant's March 2003 hearing, this clinician, who has expertise in treating sexual offenders and was accepted as an expert witness in the area of clinical psychology, gave Applicant a positive prognosis. While sexual behavior involving minors is the type of conduct that could raise the risk of vulnerability to coercion or blackmail, those closest to Applicant aware of the past misconduct, and he was candid about his criminal record when he completed his SF 86. Several mitigating conditions apply: a. the criminal behavior was not recent, and f. there is clear evidence of successful rehabilitation under Guideline J, and E2.A4.1.3.2. the behavior was not recent and there is no evidence of subsequent conduct of a similar nature, and E2.A4.1.3.3. there is no other evidence of questionable judgment, irresponsibility, or emotional instability under Guideline D.

Yet, under the Directive following the implementation of 10 U.S.C. § 986, an applicant convicted in a Federal or State court of a crime and sentenced to imprisonment for a term exceeding one year cannot be granted a clearance, either on initial application or renewal, unless meritorious circumstances exist as determined by the Secretary of Defense (*see* mitigating condition g. of the criminal conduct guideline). Applicant's criminal sentences of concurrent two year prison terms, albeit suspended, would appear to disqualify him from further access absent a waiver granted by the Secretary of Defense. Applicant challenges the applicability of 10 U.S.C. § 986 in light of the district court judge's order of January 1986 vacating the convictions and jail sentences. Rule 29 (a) of the pertinent state's rules of criminal procedure, under which Applicant contends his conviction was revoked, provides as follows:

The trial judge upon his own motion or the written motion of a defendant filed within sixty days after the imposition of a sentence, within sixty days after receipt by the trial court of a rescript issued upon affirmance of the judgment or within sixty days after entry of any order or judgment or an appellate court denying review of, or having the effect of upholding, a judgment of conviction, may, upon such terms and conditions as he shall order, revise or revoke such sentence if it appears that justice may not have been done. (Ex. A).

As a matter of federal supremacy, the application of 10 U.S.C. § 986, a federal statute, is not dependent on state law. The DOHA Appeal Board recently stated in ISCR Case No. 01-00407, decided September 18, 2002:

Unless Congress has specifically indicated that state law controls, what constitutes a 'conviction' for purposes of a federal statue is a question of federal law . . . When Congress has not indicated that state law should apply in determining whether a person is a convicted felon under a federal statute, the federal courts consider the practical reality of whether a person has been convicted, not the particular labels that may be used to describe a person's status.

In that case, the Appeal Board concluded that for purposes of 10 U.S.C. § 986, a conviction is not negated or nullified by subsequent state action which sets aside that conviction, dismisses the prosecution, and declares that the dismissal had the same effect under state law as an acquittal.

In Applicant's case, the decision to vacate the guilty findings--some sixteen months after the convictions--was apparently made on the basis of the favorable prognosis rendered by the clinical psychologist who had been treating Applicant for eighteen months. There is no indication the convictions were set aside because of compelling evidence indicating Applicant did not commit the felonious acts. To the contrary, when the judge vacated the convictions, he indicated in his order that guilty findings were still warranted as to both counts, and he extended Applicant's probation to August 1991. For purposes of 10 U.S.C. § 986, the revocation has the same impact as a post- conviction remedy such as a state pardon or expungement. Applicant's felony convictions are not nullified by the revocation and 10 U.S.C. § 986 applies in his case. Hence, the Department of Defense is precluded from renewing Applicant's security clearance. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

FORMAL FINDINGS

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to 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

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.

Elizabeth M. Matchinski

Administrative Judge

1. On or about March 25, 2003, Applicant's counsel faxed to DOHA Arlington a copy of the motion for order to confirm Applicant's eligibility for security clearance without a hearing (Ex. C). Copies of the motion were not received by either the undersigned or Department Counsel before the hearing on March 27, 2003. Department Counsel was provided on March 21, 2003, with Applicant's motion in opposition to the applicability of 10 U.S.C.§ 986 (Ex. A), to which she submitted a written response (Ex. 1) at the hearing.

2. Legal principles such as *res judicata* (which precludes a subsequent action between the same parties on the same cause of action after a valid and final judgment on the merits) and collateral estoppel (which precludes re-litigation of an issue that has been fully litigated by the same parties previously even in a different claim or cause of action) cannot be invoked to avoid the application of 10 U.S.C. § 986. Whereas Congress mandated 10 U.S.C. § 986 applies also to

individuals seeking renewal of a security clearance, application of *res judicata* would violate congressional intent. The DOHA Appeal Board has consistently held that "[a] favorable security clearance decision does not give an applicant the right to retain a security clearance regardless of subsequent events or changed circumstances." (3)

3. *See* ISCR Case No. 97-0191, April 28, 1998, at p.3, citing an earlier decision in DISCR Case No. 86-3543, decided April 27, 1989. - -

4. The nature of the sexual contact was not explored at the March 2003 hearing. Following a November 1986 hearing, then Hearing Examiner Leon J. Schachter found Applicant had engaged in "mutual petting" with these minor females.

5. At the March 2003 hearing, the clinical psychologist distinguished regressive pedophiles where the behavior occurs with a regression of functional level from fixated sexual offenders, whose primary objective is to constantly look at children. (Tr. p. 93). Regressive pedophiles are more likely to be responsive to treatment and intervention. (Tr. p. 100).

6. Notwithstanding the recency and seriousness of the criminal sexual misconduct, the Hearing Examiner was persuaded by the favorable prognosis of Applicant's therapist and the fact that this prognosis was accepted by the district court judge. (Ex. C). It would be improper at this juncture to state whether I would have come to the same conclusion in 1986.

7. Section 986 of Title 10 limits the grant of security clearances:

(a) Prohibition.--After the date of the enactment of this section, the Department of Defense may not grant or renew a security clearance for a person to whom this section applies who is described in subsection (c).

(b) Covered Persons.--This section applies to the following persons:

(1) An officer or employee of the Department of Defense

(2) A member of the Army, Navy, Air Force, or Marine Corps who is on active duty or is in an active status.

(3) An officer or employee of a contractor of the Department of Defense.

(c) Persons Disqualified From Being Granted Security Clearances.--A person is described in this subsection if any of the following applies to that person;

(1) The person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year. . .

(d) Waiver Authority--In a meritorious case, the Secretary of Defense or the Secretary of the military department concerned may authorize an exception to the prohibition in subsection (a) for a person described in paragraph (1) or (4) of subsection (c). The authority under the preceding sentence may not be delegated.

8. Applicant has consistently maintained the conduct was committed in 1977 and 1978. The Hearing Examiner indicated in his decision of December 1986 that Applicant had testified to the last incident occurring in 1979. While the SOR issued in August 2002 alleges Applicant was charged based on conduct alleged to have occurred between 1977 and 1978, he was charged criminally for indecent assault committed in July 1979 and August 1979.

9. When asked at the hearing whether there was an attempt to involve the girls subsequent to the indecent assault in the late 1970s, Applicant responded there was no touching, but he admitted to some verbal harassment of the victims prior to his arrest in 1984. (Tr. p. 147).