

DATE: July 31, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-23705

**DECISION OF ADMINISTRATIVE JUDGE**

**CLAUDE R. HEINY**

**APPEARANCES**

**FOR GOVERNMENT**

Eric C. Hogan, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

In 1974, the Applicant received deferred prosecution for child molestation. In 1993, the Applicant was found guilty of misdemeanor child abuse and sentenced to two years confinement. Because both incidents of misconduct are remote in time, the criminal activity is resolved in favor of the Applicant. However, 10 U.S.C. § 986 prohibits the granting of a security clearance absent a waiver by the Secretary of Defense. Therefore, the Applicant's security clearance is denied. I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

**STATEMENT OF THE CASE**

On January 23, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating DOHA could not make the preliminary affirmative finding<sup>(1)</sup> it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On February 13, 2003, the Applicant answered the SOR and elected to have his case decided on the written record in lieu of a hearing. On 15 April, 2003, the Applicant received a complete copy of the File of Relevant Material (FORM) dated March 25, 2003. The Applicant responded to the FORM on 12 May 2003. I was assigned the case on May 23, 2003, at which time the record closed. The Department Counsel presented 11 exhibits (Gov. Items) and the Applicant submitted 13 items. (App. Items)

**FINDINGS OF FACT**

The SOR alleges criminal conduct (Guideline J). The Applicant admits the allegations with explanation. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact.

The Applicant is 47-years-old, has worked for a defense contractor since August 1998, and is seeking a security clearance.

In September 1973, the Applicant--then age 17--sat in his car and was approached by an eight-year-old girl and her nine-year-old cousin. He unbuttoned the pants of an eight-year-old female, put his hand inside her pants, and put his finger inside her. (Gov. Item 10) The Applicant received deferred prosecution for child molesting for a period of 12 months which started in March 1974.

In May 1991, the Applicant was dating a woman who had two children, a daughter age five, and a son age three. The Applicant returned home after running errands and found the boy crying and holding his head. The mother stated the child was sick, she put him to bed, and left for work. When the Applicant looked in on the child, he found the child on the floor twitching and non responsive. He called 911, an ambulance arrived, and the child was taken to the hospital. The child died, cause of death being a blow to the head. The Applicant was accused of hitting the child in the head with a hairbrush and was arrested for child abuse (a felony) and second-degree murder. The Applicant alleges he did not hit the child, but that the child's mother had struck the child before he arrived home.

In July 1993, the Applicant was found guilty of misdemeanor child abuse, meaning the child was injured, however the injuries were neither permanent nor life-threatening, (App. Item J) and was sentenced to two years confinement. (App. Item M) The Applicant served less than 30 days in jail<sup>(2)</sup> before being released on one-year parole. The jury foreman stated the jury did not have enough evidence to prove exactly when the injuries occurred. (Gov. Item 7) The Applicant was in the Army at time of incident. Following the trial, he was administratively reduced from the rank of E-7 to the rank of E-1. (Gov. Item 6) Because of the reduction in rank, the Applicant was not allowed to reenlist and left the Army after 16 years of service. Applicant's duty performance was indicted as "truly exemplary duty performance." (App Ex B)

Because the Applicant was sentenced to more than one year in jail, 10 U.S.C. 986 applies. The Applicant requests a waiver of 10 U.S.C. 986 be granted.

## 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. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must 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.<sup>(3)</sup>

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent.

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**

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* 484 U.S. at 527. The President has restricted eligibility for access to classified information to "United States citizens . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, at 531. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing 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.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, at 531. 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 an applicant is shown to have a history or pattern of criminal activity which creates doubt about his judgment, reliability, and trustworthiness. In 1974, the Applicant--then age 17--received deferred prosecution for child molestation. In May 1991, he was arrested for felony child abuse and second-degree murder following the death of a three-year-old. In 1993, he was found guilty of misdemeanor child abuse and sentenced to two years in the state penitentiary. Even though he was convicted of a misdemeanor, the Army considered his action so serious it reduced him from E-7 to E-1, which prevented him from reenlisting and forced him to leave the Army after 16 years of service. Because of his 1993 conviction, Disqualifying Condition (DC) b. (4) applies and because he was sentenced to more than one year in jail, DC c. (5) applies.

Mitigating Condition (MC) a. (6) mitigates the Applicant's 1974 criminal conduct because the conduct is not recent, having occurred 29 years ago, when the Applicant was 17 years old. MC a. also mitigates the Applicant's 1991 arrest which it is not recent, having occurred 12 years ago. The Applicant's case in mitigation becomes stronger as the Applicant has not been involved in any criminal conduct since May 1991. I find for the Applicant as to SOR subparagraphs 1.a. and 1.b.

None of the other mitigating factors apply. The record is silent as to the Applicant's current lifestyle, behavior, duty performance, rehabilitation over the past 12 years, steady employment, community involvement, any demonstration of good judgment and reliability, or that those factors leading to the criminal conduct are not likely to repeat themselves.

With the record being silent, there has been no showing of clear evidence of successful rehabilitation. Therefore, MC f. (7) does not apply.

Because the Applicant was sentenced to more than one year in jail, Title 10 United States Code Section 986 applies. I find against the Applicant as to SOR subparagraph 1.c.

Unless the Applicant is able to obtain a waiver from the Secretary of Defense, the Department of Defense is prohibited by 10 U.S.C. § 986 from granting the Applicant a clearance. It is clear that a man can change for the better after 12 years. However, the record evidence must establish this change. Because this was a FORM, I had no opportunity to observe the Applicant as he testified. The record is silent as to any favorable rehabilitation during the past 12 years. The record is also silent as to a showing of steadily employment, good duty performance, or a demonstration of good judgment and reliability. Without record evidence, I cannot speculate as to favorable rehabilitation. Therefore, I do not recommend further consideration of this case for a waiver of Title 10 U.S.C. 986.

### **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.: For the Applicant

Subparagraph 1.c.: Against the Applicant

### **DECISION**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or renew a security clearance for Applicant. Clearance is denied. I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

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**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 Applicant's attorney indicates jail time served was 15 days. (App. Ex J)
3. 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.
4. DC b. A single serious crime or multiple lesser offenses.
5. 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.
6. MC a. The criminal behavior was not recent.
7. MC f. There is clear evidence of successful rehabilitation.