

DATE: June 19, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11489

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Fifty-six-year-old Applicant's 1987 arrest for eight counts of felonies and misdemeanors involving sexual abuse of a 14-year-old minor, contributing to the delinquency of a minor, and furnishing alcohol to a minor, when he was 41-years old, led to a sentence of imprisonment for 8 ½ years with 5 years suspended. The absence of any subsequent criminal conduct, along with some evidence of successful rehabilitation might normally mitigate the government's security concerns, but in this instance, there remain questions because Applicant does not seem to sense the gravity of his actions, or understand the motivation for them, despite his participation in counseling. Moreover, the application of 10 U.S.C. § 986 disqualifies him from such eligibility. Clearance is denied. Further consideration of this case for a waiver of 10 U.S.C. § 986 is not recommended.

STATEMENT OF THE CASE

On January 15, 2003, 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 Personnel 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 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 a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated February 3, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record, in lieu of a hearing. Department Counsel submitted the government's written case on March 24, 2003. A complete copy of the file of relevant material (FORM) [\(U\)](#) was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Any such submissions were due by May 26, 2003, and it appears he chose not to do so because nothing was received from him. The case was assigned to this Administrative Judge on June 5, 2003.

FINDINGS OF FACT

Applicant has admitted the factual allegations pertaining to criminal conduct under Guideline J. 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:

Applicant is a 56-year old employee of a defense contractor, and is seeking to retain a security clearance, a clearance initially granted in 1985.

Applicant is a registered sex offender, [\(2\)](#) as a result of the two criminal incidents (during the evening and the following morning) in which he was involved 16 years ago. In June 1987, when he was 41-years old, Applicant, his was indicted by a grand jury for a variety of criminal activities which occurred in March of that year. The charges were as follows: 1) Sexual Abuse of a Minor, 2nd degree-digital penetration of 14-year-old minor- a class B felony; 2) Sexual Abuse of a minor, 3rd degree-touching a 14-year-old minor's breasts-a class C felony; 3) Sexual Abuse of a Minor, 2nd degree-cunnilingus upon a 14-year-old minor-a class B felony; 4) Sexual Abuse of a Minor, 3rd degree-causing a 14-year-old minor to touch Applicant's genitals-a class C felony; 5) Sexual Abuse of a Minor, 3rd degree-masturbating against the thigh of a 14-year-old minor-a class C felony; 6) Sexual Abuse of a Minor, 3rd degree-touching a 14-year-old minor's genitals with his foot-a class C felony; 7) Contributing to the Delinquency of a Minor-aiding, inducing, causing or encouraging a 14-year-old minor to consume, possess or control alcoholic beverages-a class A misdemeanor; and 8) Furnishing Alcohol to a Minor-a class A misdemeanor. [\(3\)](#) Following a jury trial, in April 1988, he was convicted of all counts as charged. [\(4\)](#)

He was sentenced in the following manner: Counts 1 and 3: 2 ½ years on each count, to run concurrently with one another; Counts 2, 4, 5, and 6: 5 years on each count, all suspended, to run concurrently with each other and Counts 1 and 3, and placed on 5 years probation; Counts 7 and 8: 6 months to serve concurrently with each other, but consecutive with Counts 1 and 3. [\(5\)](#) In addition, the Court recommended mental health counseling and sexual offender treatment while Applicant was in confinement. [\(6\)](#) In total, Applicant was sentenced to 8 ½ years in prison with 5 years suspended. [\(7\)](#)

Two weeks prior to the incident, Applicant's 13-year-old daughter moved in with him. When he discovered she and a 14-year-old friend were going out drinking, he became concerned and offered to purchase alcohol for them which they could consume at home. He obtained a bottle of Jack Daniel's whiskey and they consumed it at his home. [\(8\)](#) He contended the 14-year-old friend started coming on to him by asking him to have sex with her. He was aware of her age and was tempted to give in. Since she persisted, he did so. Applicant touched her sexually and performed oral sex upon her. She did not resist or tell him to stop. [\(9\)](#) The following morning, when he went into the bedroom where the girls were sleeping, he again had, what he characterized as "consensual sexual contact," with the 14-year-old. [\(10\)](#) During the trial, the victim disputed Applicant's description of events and testified he had forced himself upon her. [\(11\)](#) Whether there was consensual or forcible sex is not the issue in this instance, as the victim was only 14-years-old.

Applicant spent approximately 18 months in jail, followed by a halfway house for two or three months. He underwent daily sexual offender counseling while in jail, and later attended monthly counseling for approximately two years after his release from jail. [\(12\)](#) He last attended counseling in about 1994.

Applicant has been employed by the same company since June 1996, where he now serves as a Service Technician. [\(13\)](#) The quality of his performance has not been developed in the record. He had previously served in the Air Force Reserve from April 1964 until April 1972. He has been married twice (1964 and 1980) and divorced twice (1978 and 1981), and has one son and two daughters.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

[Criminal Conduct - Guideline J]: 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, as well as those which could mitigate security concerns, are set forth and discussed in the Conclusions section below.

On June 7, 2001, the Deputy Secretary of Defense issued a Memorandum, *Implementation of Restrictions on the Granting or Renewal of Security Clearances as Mandated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001*. The memorandum provides policy guidance for the implementation of Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Title 10, United States Code, to add a new section (10 U.S.C. § 986) that precludes the initial granting or renewal of a security clearance by the Department of Defense under specific circumstances. The situation described above involves one of those specific circumstances.

The statutory mandate applies to any DoD officer or employee, officer, director, or employee of a DoD contractor, or member of the Army, Navy, Air Force, or Marine Corps on active duty or in an active status, who is under consideration for the issuance or continuation of eligibility for access to classified information and who falls under one or more of the following provisions of the statute:

- (1) has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year;
- (2) is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802));
- (3) is mentally incompetent, as determined by a mental health professional approved by the Department of Defense; or
- (4) has been discharged or dismissed from the Armed Forces under dishonorable conditions.

The statute also provides that the Secretary of Defense and the Secretary of the Military Departments concerned may authorize a waiver of the prohibitions concerning convictions, dismissals and dishonorable discharges from the armed

forces in meritorious cases. ⁽¹⁴⁾

Implementing guidance attached to the memorandum indicates that provision 1, described above, "disqualifies persons with convictions in both State and Federal courts, including UCMJ offenses, with sentences imposed of more than one year, regardless of the amount of time actually served."

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard the issuance of the clearance is "clearly consistent with the interests of national security," ⁽¹⁵⁾ or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegation set forth in the SOR:

With respect to Guideline J, the government has established its case. By his own admission, Applicant was arrested and charged with eight felonies and misdemeanors. He was convicted by a jury and sentenced to 8 ½ years in prison with 5 years suspended. Applicant's criminal conduct in this regard clearly falls within Criminal Conduct Disqualifying Condition (DC) E2.A10.1.2.1. (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*), DC E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*), and DC E2.A10.1.2.3. (*conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year*).

It has been 16 years since the criminal conduct of 1987. Since that time, Applicant has not been involved in any additional criminal conduct. Those facts activate Criminal Conduct Mitigating Condition (MC) E2.A10.1.3.1. (*the criminal behavior was not recent*). A person should not be held forever accountable for misconduct from the past when there is a "clear" indication of subsequent reform, remorse, or rehabilitation. By virtue of his spotless record since the arrest, and the participation in sexual offender counseling until 1994, there is evidence of successful rehabilitation, which might activate MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*). However, while there is evidence of rehabilitation, that evidence is not so compelling, in my view, to enable me to characterize it as "clear" evidence. I remain concerned about the fact that Applicant ceased attending sexual offender counseling in 1994 and by his insistence that his daughter and the victim lied about Applicant's sexual activities with the victim in 1987. Whether all of the testimony of the victim was accurate or not is not the issue. It remains undisputed that the then 41-year-old Applicant voluntarily participated in wrongful and illegal acts involving a 14-year-old victim. Yet, he does not seem to sense the gravity of his actions, or understand the motivation for them, despite his participation in counseling. Under these circumstances, I would conclude Applicant had failed to mitigate or overcome the Government's case, and the allegation of the SOR would be concluded against

Applicant.

Moreover, Applicant's criminal conduct in this regard also falls within 10 U.S.C. § 986. He was convicted in a state court of felony and misdemeanor crimes and sentenced to imprisonment for a term which obviously exceeds the one year period envisioned in the law. Furthermore, as noted above, the implementing guidance attached to the memorandum indicates such a sentence would disqualify persons with "sentences imposed of more than one year, regardless of the amount of time actually served." In this instance, Applicant was fortunate enough to have his prison term eventually reduced rather than actually served in its entirety, but that fact does not help him in this issue. Consequently, by virtue of 10 U.S.C. § 986, I conclude Applicant is not eligible for a security clearance. Accordingly, allegations 1.a. and 1.b. of the SOR, are concluded against Applicant.

In this instance, I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1.a.: Against 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 Applicant. Moreover, I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Robert Robinson Gales

Chief Administrative Judge

1. The government submitted eight items in support of its contentions.
2. Item 6 (Statement, dated November 26, 2001), at 3.
3. Item 7 (Court File-Indictment, dated June 18, 1987), at 1-4.
4. *Id.*-(Court File-Judgment and Order of Commitment/Probation, dated April 25, 1988), at 1.
5. *Id.*, at 2.
6. *Id.*
7. *Id.*-(Court File-District Attorney's Memorandum in Opposition to Rescheduling Hearing, dated December 28, 1989), at 1-2.
8. Item 6, *supra* n. 2, at 2.
9. *Id.*
10. *Id.*

11. *Id.*

12. *Id.*, at 3.

13. *See* Item 5 (Security Clearance Application, dated July 10, 2001), at 5.

14. *See* Criteria for Implementing the Provision of 10 U.S.C. 986 in all DoD Determinations for Access to Classified Information, attached to Memorandum, *Implementation of Restrictions on the Granting or Renewal of Security Clearances as Mandated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001*, dated June 7, 2001.

15. *See* Exec. Or. 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (*see* Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (*see* Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (*see* Enclosure 2, Sec. E2.2.2.)