

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Title 10 United States Code § 986 prohibits Applicant from holding a security clearance based on his October 1997 felony conviction for committing a lewd act upon a minor, sentence of eight years in prison, and incarceration for approximately four years. Although he claims to be innocent, he was found guilty of sexually molesting his 12-year-old daughter. Applicant's refusal to accept responsibility for his behavior does not support mitigation of the sexual behavior or criminal conduct concerns. I recommend against further consideration for a waiver of 10 U.S.C. § 986. Clearance is denied.

CASENO: 05-03259.h1

DATE: 05/24/2006

DATE: May 24, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-03259

DECISION OF ADMINISTRATIVE JUDGE

ERIN C. HOGAN

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Albert Stoll, Personal Representative

SYNOPSIS

Title 10 United States Code § 986 prohibits Applicant from holding a security clearance based on his October 1997 felony conviction for committing a lewd act upon a minor, sentence of eight years in prison, and incarceration for approximately four years. Although he claims to be innocent, he was found guilty of sexually molesting his 12-year-old daughter. Applicant's refusal to accept responsibility for his behavior does not support mitigation of the sexual behavior or criminal conduct concerns. I recommend against further consideration for a waiver of 10 U.S.C. § 986. Clearance is denied.

STATEMENT OF CASE

On September 30, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. This action was taken under Executive Order 10865, dated February 20, 1960, as amended and DoD Directive 5220.6, dated January 2, 1992, as amended and modified. The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline J, Criminal Conduct, and Guideline D, Sexual Behavior.

In a sworn statement dated October 19, 2005, Applicant responded to the SOR allegations and requested a hearing. The case was assigned to me on February 17, 2006. A notice of hearing was issued on March 9, 2006, scheduling the hearing for March 30, 2006. The hearing was conducted on that date. The government submitted five exhibits that were marked as Government Exhibits (Gov. Ex.) 1-5 and admitted without objection. Applicant testified on his own behalf, had one character witness and submitted no exhibits. DOHA received the hearing transcript (Tr.) on April 10, 2006.

FINDINGS OF FACT

In his SOR response, Applicant admits the allegations in subparagraphs 1.a and 1.b but denies the allegation in 1.c and

2.a. Applicant's admissions are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 48-year-old material coordinator who is employed with a Department of Defense contractor and is applying for a security clearance.⁽¹⁾ He is divorced and has two children, a 23-year-old daughter and a 26-year-old son.⁽²⁾ He has a general equivalency diploma.⁽³⁾

From November 6, 1979 to June 15, 1993, he served on active duty in the United States Army achieving the rank of Sergeant (E-5). He was in the Transportation career field.⁽⁴⁾ On September 4, 1992, he received Article 15 nonjudicial punishment for Conspiracy in violation of Article 81, Uniform Code of Military Justice (UCMJ) and Altering Official Document in violation of Article 107, UCMJ. He and six other service members conspired to produce fraudulent U.S. Army Logistics Management College Graduation certificates which were entered into their noncommissioned officer promotion points packets in order to increase their chances of advancing to a higher enlisted rank and pay grade.⁽⁵⁾ He received a suspended reduction to the grade of Specialist (E-4).⁽⁶⁾

On June 20, 1996, Applicant's 12-year-old daughter reported that he had been sexually molesting her. She stated that he fondled her privates with his hand on multiple occasions during the year and had attempted to have sexual intercourse with her. His daughter reported this information to her mother, to the police, to a doctor during a medical evaluation after reporting the incidents, and to a mental health counselor during a taped interview.⁽⁷⁾

On August 12, 1996, a criminal arrest warrant was issued against Applicant for criminal sexual conduct with a minor.⁽⁸⁾ On October 16, 1997, after a fully litigated trial, he was convicted of Committing a Lewd Act Upon a Minor and sentenced to eight years in prison.⁽⁹⁾ He was incarcerated from October 1997 to August 2001.⁽¹⁰⁾ He is registered as a sex offender.⁽¹¹⁾ He did not receive counseling while incarcerated.⁽¹²⁾

Applicant appealed his conviction. On April 21, 1999, the South Carolina Court of Appeals dismissed the appeal.⁽¹³⁾

Applicant states he is innocent of the charge. He claims that his ex-wife influenced his daughter to report that he sexually molested her. He claims she was seeking revenge since he told her he wanted a divorce.⁽¹⁴⁾ He provided an unsworn statement from his daughter which recants her earlier testimony.⁽¹⁵⁾ Applicant requests a waiver from the Secretary of Defense.⁽¹⁶⁾

Applicant has been working for his current employer since March 2002. He started out as a temporary worker but was hired as a full-time employee on June 24, 2002. ⁽¹⁷⁾ His employer testified on his behalf and also served as his personal representative. He states Applicant is a very good worker. He shows up to work on time and needs no supervision. ⁽¹⁸⁾

POLICIES

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." ⁽¹⁹⁾ In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Guideline J, Criminal Conduct: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. ⁽²⁰⁾

Guideline D, Sexual Behavior: 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. ⁽²¹⁾

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." ⁽²²⁾ An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. ⁽²³⁾ An administrative judge should consider the following factors: (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. ⁽²⁴⁾

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information.⁽²⁵⁾ Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts admitted by the applicant or proven by Department Counsel. The applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision.⁽²⁶⁾ "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security."⁽²⁷⁾

A person granted access to classified information enters into a special relationship with the government. 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. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

Smith Amendment

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 that act. The amendment was added to 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 statutory mandate applies to any employee of a DoD contractor who is under consideration for the issuance or continuation of eligibility for access to classified information. The relevant provision of the statute that applies to this case is that a person who has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year is prohibited from holding a security clearance.⁽²⁸⁾ The statute provides that the Secretary of Defense and the Secretary of the Military Departments concerned may authorize a waiver of the prohibitions concerning criminal convictions.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline J, Criminal Conduct, and Guideline D, Sexual Behavior.

Criminal Conduct

The government established its case under Guideline J. In September 1992, Applicant was punished under Article 15, UCMJ for a violation of Article 81, Conspiracy and Article 107, Altering an Official Document. He and several of his co-workers conspired to produce fraudulent training certificates in order to make them more competitive for promotion purposes. In October 1997, after a fully litigated trial, he was convicted of Committing a Lewd Act Upon a Child Under 16 and was sentenced to eight years in prison. As such, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1: (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*) and CC DC E2.A10.1.2.2: (*A single serious crime or multiple lesser offenses*) apply.

Title 10 U.S.C. § 986 applies with respect to Applicant's October 1997 conviction for Committing a Lewd Act Upon a Child Under 16, since he was convicted in a United States court, was sentenced to prison for more than one year, and served four years in a state prison.

The criminal conduct concern can be mitigated. Criminal Conduct Mitigating Conditions (CC MC) E2.A10.1.3.1: (*The criminal behavior was not recent*) applies since Applicant's last criminal conduct occurred over ten years ago. However, I give this mitigating condition little weight since he fails to accept responsibility for his actions. He proclaims his innocence and alleges his ex-wife influenced his daughter into filing a false report against him. In response to the SOR, he presented a document which he claims is a letter from his daughter recanting her previous allegations of abuse. The letter indicates the daughter falsely accused her father of molesting her because she did not want to live under his strict discipline. I give the letter no weight since it is unsworn and the daughter was not subject to cross-examination. Furthermore, the doctrine of collateral estoppel prevents the Applicant from re-litigating his case.

CC MC E2.A10.1.3.2: (*The crime was an isolated incident*) does not apply since Applicant has committed more than one criminal offense in the past. Specifically, the conduct while on active duty in the U.S. Army which was the basis of his punishment under Article 15, UCMJ, as well as his multiple acts of sexual molestation of his daughter which occurred on multiple occasions over a one year period. Although he has not committed any criminal offenses since being released from prison and has a favorable employment record, his failure to take responsibility for the offense as well as his failure to seek counseling does not support the notion that he is fully rehabilitated. As such, CC MC E2.10.1.3.6: (*There is clear evidence of successful rehabilitation*) does not apply.

I do not recommend further consideration of this case for a waiver in accordance with 10 U.S.C. § 986. I find against Applicant under Guideline J.

Sexual Behavior

The government established a prima facie case with respect to the sexual behavior concern.

Applicant sexually molested his twelve-year-old daughter on multiple occasions over a one year period. Specifically, he fondled her private parts with his hands and attempted to have sexual intercourse with her. He was subsequently convicted of a felony offense after a fully litigated trial. Sexual Behavior Disqualifying Conditions (SB DC) E2.A4.1.2.1: (*Sexual behavior of a criminal nature, whether or not the individual has been prosecuted*) and E2.A4.1.2.4 (*Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment*) apply to his case. Although the sexual behavior was not of a public nature, it certainly demonstrates a lack of discretion and judgment.

The sexual behavior concern can be mitigated. I find none of the mitigating conditions apply due to Applicant's refusal to accept responsibility for his actions. I find against Applicant under Guideline D.

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 APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Erin C. Hogan

Administrative Judge

1. Tr. at 19, 48.

2. Tr. at 48.

3. Tr. at 47.

4. Tr. at 46.

5. Gov. Ex. 3.

6. *Id.*

7. Gov. Ex. 4 at 2.

8. Gov. Ex. 4 at 1.

9. Gov. Ex. 4 at 14.

10. Gov. Ex. 1, question 21; Gov. Ex. 2 at 4.

11. Gov. Ex. 4 at 16.

12. Tr. at 47.

13. Gov. Ex. 4 at 15.

14. Gov. Ex. 2.

15. Answer to SOR.

16. Tr. at 17.

17. Tr. at 18-19.

18. Tr. at 18-20.

19. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

20. Directive, ¶ E2.A10.1.1.

21. Directive, ¶ E2.A4.1.1.

22. Directive, ¶ E2.2.1.

23. *Id.*

24. *Id.*

25. Directive, ¶ E3.1.14.

26. Directive, ¶ E3.1.15.

27. Directive, ¶ E.2.2.2.

28. (On October 9, 2004, Section 1062 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 amended portions of 10 U.S.C. § 986. The amendment added the requirement that a person who was convicted and sentenced to more than one year in prison, actually served over one year in prison).