

DATE: November 19, 1997

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In Re:

Applicant for Security Clearance

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ISCR Case No. 97-0397

**DECISION OF ADMINISTRATIVE JUDGE**

**JOSEPH TESTAN**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin H. Howry, Department Counsel

**FOR APPLICANT**

*Pro Se*

**STATEMENT OF THE CASE**

On July 1, 1997, the Defense Office Of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) (copy appended) 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 clearance should be denied or revoked.

The applicant responded to the SOR in writing on July 23, 1997, and elected to have his case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's written case on or about August 28, 1997. The applicant filed a response to the Government's written case on September 29, 1997. The case was received by the undersigned Administrative Judge on October 6, 1997.

**FINDINGS OF FACT**

Applicant is thirty-seven years of age.

Applicant sexually molested his minor stepdaughter on three occasions between 1994 and late September 1996. After the last incident in September 1996, the stepdaughter told "an unknown third party" (G-5) about the molestation and that person contacted the authorities. Applicant was questioned by the state child protective service, and he subsequently gave a statement to the police. [\(U\)](#)

As a result of action taken by the state child protective service, applicant was forced to live apart from his family from September 24, 1996 to February 17, 1997. The family is now living together without any restrictions.

From October 2, 1996 to April 15, 1997, applicant received treatment from a psychologist for conditions diagnosed as Frotteurism and Fetishism. In a letter dated July 20, 1997, the psychologist discussed his work with applicant and applicant's family. He stated in pertinent part:

"I met (applicant) on October 2, 1996 when he came to me seeking my counseling services. Since that date I have come to truly admire him. Nobody excuses what he may have done, but I do hereby state that I have never in my years of

practice seen any person tackle their predicament so forthrightly<sup>(2)</sup> and so valiantly. I have been honored to work with him.

"I have worked with (applicant's) family as well. Without exception, together they have done everything that could have been expected of them. This is most unusual to see. Usually I must combat and confront until I break through. Not so (applicant) and his family. They were all open and honest and very cooperative from the start. In my 19 years of working with families, I have never witnessed the likes of what this family was able to do.

"What all this means, I believe, is that (applicant) presents no security risk whatsoever. He cannot be blackmailed; he has nothing to hide. He is trustworthy and, most important, he is a very different man - a better man - than the one who provided his employer and his country a very valuable service back when he may have presented some risk and yet still had a security clearance."

In his response to the Government's File of Relevant Material, applicant stated that he was heavily intoxicated during the three episodes of sexual abuse and that had he not been intoxicated, "(he knows) this would not have happened." He further stated that he has not consumed alcohol since September 24, 1996, he has "enlisted the help of (his) church clergy to assist with (his) abstention of alcohol," and he is a "totally changed person now" who refuses "to return to what (he) was in the past when alcohol controlled (his) life and the lives of (his) family."

## **POLICIES**

Enclosure 2 of the Directive sets forth the Adjudication Policy (divided into Disqualifying Factors and Mitigating Factors) which must be followed by the Administrative Judge. Based on the foregoing Findings of Fact, the following Disqualifying Factors and Mitigating Factors are applicable:

### **SEXUAL BEHAVIOR**

Disqualifying Factors:

1. Sexual behavior of a criminal nature, whether or not the individual has been prosecuted.
4. Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

Mitigating Factors:

None.<sup>(3)</sup>

### **CRIMINAL CONDUCT**

Disqualifying Factors:

1. Any criminal conduct, regardless of whether the person was formally charged.
2. A single serious crime or multiple lesser offenses.

Mitigating Factors:

None.

## **CONCLUSIONS**

In DOHA cases, the Government has the initial burden of producing evidence that reasonably suggests an applicant cannot be relied upon to safeguard classified information. If the Government meets its burden, it has established a prima facie case. Once the Government establishes a prima facie case, the burden shifts to applicant to produce evidence in refutation, extenuation, mitigation or reformation sufficient to establish that, notwithstanding the Government's prima

facie case, he or she can now be relied upon to safeguard classified information. In view of the Directive's requirement that a security clearance be granted only upon a finding that to do so is clearly consistent with the national interest, the applicant has a heavy burden.

In this case, the Government established a prima facie case under Criteria D and J. The evidence establishes that applicant sexually molested his minor stepdaughter on three occasions between 1994 and late September 1996. This criminal and sexually perverted conduct reflects adversely on his judgment, reliability and trustworthiness, and reasonably suggests that he cannot be relied upon to safeguard classified information.

Applicant failed to rebut the Government's prima facie case. Although he recognizes that his conduct was inappropriate, he is very remorseful, and he has indicated a very sincere desire to avoid a recurrence of this criminal and sexually perverted conduct, the recency and seriousness of the conduct precludes a finding at the present time that applicant has reformed and is unlikely to engage in this type of irresponsible conduct in the future. For this reason, Criteria D and J are found against applicant.

## **FORMAL FINDINGS**

PARAGRAPH 1: AGAINST THE APPLICANT

PARAGRAPH 2: 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.

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Joseph Testan

Administrative Judge

1. Although there is no evidence that applicant was convicted of a crime as a result of this sexual misconduct, his November 21, 1996 statement to the Defense Investigative Service (DIS) (G-5) that he intends to plead no contest or guilty "to the charges" indicates that, at minimum, charges were filed against him.
2. Applicant's forthrightness was not evident during the first session as evidenced by the following statement made by the psychologist in his session notes (G-7): "We will just have to see how it goes, because right now he is not the completely open, broken, repentant person I thought he was going to be. I hear a too much not taking responsibility and dodging for my comfort."
3. Mitigating Factor 3 does not apply because applicant's consumption of alcohol to excess involves questionable judgment and irresponsibility.