

DATE: December 3, 2007

_____)	
In Re:)	
)	
-----)	ISCR Case No. 06-24672
SSN: -----)	
)	
Applicant for Security Clearance)	
_____)	

**DECISION OF ADMINISTRATIVE JUDGE
THOMAS M. CREAN**

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has been a software quality assurance engineer for a defense contractor for over 31 years. In the 1994 time frame, he sexually molested young girls. In 2004, the girls informed authorities of Applicant's actions, and he pled guilty to three felony charges of child endangerment. He was fined, sentenced to probation, and is a registered sex offender. In 1994 and again in 2001, Applicant admittedly viewed pre-teen pornography on the internet. He did not deliberately fail to correctly answer or provide complete information to security investigators during the course of a security investigation. Clearance is denied.

STATEMENT OF THE CASE

On July 12, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement

of Reasons (SOR) detailing the basis for its decision to deny a security clearance for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). The new adjudicative guidelines, promulgated by the President on December 29, 2005, and effective in the Department of Defense on September 1, 2006, will be used to adjudicate this case. Applicant acknowledged receipt of the SOR on July 19, 2007. The SOR alleges security concerns under Guideline D (Sexual Behavior), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of the new adjudicative guidelines.

Applicant answered the SOR in writing on August 1, 2007. He denied all allegations under Guideline D (Sexual Behavior). However in his explanation, he admitted to the underlying actions but denied that his actions now cause a security concern. He admitted two of the allegation under Guideline E (Personal Conduct) and denied the others. He admitted his security clearance had been revoked by a Department of Defense agency and that a civil action was filed for his sexual behavior. He denied he deliberately provided false or incomplete information during the security clearance process. He denied the allegations under Guideline J (Criminal Conduct) not because the criminal actions did not take place, but that they no longer cause a security concern. He requested that the matter be resolved without a hearing. However, the government, through Department Counsel, requested a hearing before an Administrative Judge.¹ Department Counsel was prepared to proceed with the case on October 2, 2007. The case was assigned to another Administrative Judge, and reassigned to me on November 5, 2007. A notice of hearing was issued on November 5, 2007, and the hearing convened on November 15, 2007.² Eleven government exhibits, marked Government Exhibits 1-11, were received and admitted without objection. Four Applicant exhibits, marked Applicant Exhibits A-D, were received and admitted without objection. The testimony of Applicant and one Applicant witness were received during the hearing. The transcript (Tr.) was received by DOHA on November 27, 2007.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is 51 years old, a college graduate in electrical engineering, and employed by a defense contractor for over 31 years as a software quality assurance engineer. He has been married for 28 years and has twin 23 year old daughters. His father is deceased but his mother is still living.

Applicant's father was disabled, and became an alcoholic when Applicant was young. Applicant was exposed as a youth to the pornography his father kept in the house.³

¹Government Exhibit 1 (Memorandum, dated August 21, 2007).

²Applicant waived the 15 day notice requirement. Tr. at 7.

³Tr. 23-24.

Applicant held a security clearance, including access to Sensitive Compartment Information (SCI), for over ten years.⁴ Applicant's supervisor noted he is a hard worker and a man of excellent character. He has complete confidence in his ability to protect classified information. He does not believe Applicant would succumb to pressure to disclose or abuse classified information.⁵ Applicant's minister provided a letter of recommendation that accompanied Applicant's response to the SOR. The minister noted Applicant is treasurer of their church and has performed his duties with competence and good humor. Applicant also assisted members of the congregation with needed transportation. Applicant is a trusted and valued member of the Finance Committee and Church Council.⁶ One of Applicant's daughters testified that her father is now a changed person from what he was like in the 1994 time frame. He is a kinder and gentler person who she loves.⁷

During the time frame of 1994 to 1996, Applicant sexual molested two eight to ten year old sisters who were playmates of his daughters and lived next door to his family. He took the girls to a private room in his house and had them sit on his lap. He fondled the girls, including their genital areas, exposed his penis to them, and had them touch it. He is not sure of the number of times this happened but it happened more than five times with one of the girls and at least once with the other girl. Some of the action happened under a blanket while other children were in the room. There was no sexual intercourse or penetration. The girls did not reveal his actions until they informed authorities of the incidents ten years later in 2004. A third child also told authorities that Applicant sexually molested her in the same manner during the same time frame. Applicant admits that he was viewing pornography, to include adult pornography and pornography of pre-teen girls starting in the early 1990s and continuing until at least 1995 and during the time he was molesting the girls. He masturbated while viewing the pornographic images.⁸ Viewing child pornography, of which pre-teen qualifies, is a violation of federal law.⁹

He also admitted he would consume five or six drinks of alcohol before molesting the girls to lower his inhibitions.¹⁰ In a pre-sentencing session, Applicant denied he was under the influence

⁴Tr. 23-26; Government Exhibit 2 (Security Clearance Application, dated December 20, 2001).

⁵Appellant Exhibit C (Letter, dated November 13, 2007).

⁶Response to SOR (Letter, dated July 25, 2007).

⁷Tr. 80-83.

⁸Tr. 26-30, 68.

⁹18 U.S.C. 2252 and 18 U.S.C. 2252A. 18 U.S.C. 2252 was in effect in 1994 and was amended to 18 U.S.C. 2252A in 1998. The criminal conduct was the same under both statutes and pertains to the act of using and viewing child pornography which includes images of pre-teenagers.

¹⁰Tr. 30-32, 54-55, 77; Government Exhibit 3 (Interrogatory, dated March 23, 2007).

of drugs or alcohol at the time the girls were molested.¹¹

Applicant was charged by authorities with three felony counts of Endangering the Welfare of a Child. He pled guilty to the three offenses. He admitted drinking alcohol before molesting the girls but denied being under the influence of alcohol or drugs at the time. He was sentenced to three years probation, fined \$22,500, and court costs. His probation runs until September 2008. Applicant denied that he molested the third girl but pled guilty on the advice of his attorney so he would be sentence to probation and not incarcerated.¹² He is a registered sex offender.¹³ The two sisters and their family and the third girl filed civil suits for damages in 2006 for the sexual abuse. Appellant settled the suit by the two sisters and paid civil damages to the girls and their families.¹⁴ The action by the third was dismissed with prejudice.¹⁵

After his actions with the girls, Applicant became active in his church, and was baptized into the church in April 1995.¹⁶ He did not drink alcohol or view pornography from 1995 until approximately late 2000 when his father-in-law committed suicide. He and his wife shared a six-pack of beer at the time, and he again started accessing internet pornography. He knew some of the pornography to be of pre-teen girls. He accessed pornography after his father-in-law's death a number of times in late 2000 to early 2001. He stated he first viewed adult pornography and then willingly looked at pornography labeled as pre-teen pictures. He masturbated while viewing the adult and pre-teen images.¹⁷

Applicant was examined by a forensic psychologist in 2005 as part of his sentence for child molesting. The psychologist concluded that his test scores fall in the low range for sexual recidivism and psychopathic tendencies. He noted a concern for Applicant's sexual opportunistic behavior towards children which requires him to have regular therapy. The psychologist stated Applicant needs to address deviant sexual arousal patterns, impulsive behaviors, and sexual fantasy. Applicant told the psychologist he believes "he has corrected his past sexual problem and has not had any problems for over nine years."¹⁸ Applicant is not sure if he discussed with the psychologist that he viewed pornography, including pre-teen images, in 2000-2001. He is also not sure if he discussed with the psychologist that he consumed beer in 2001. There is no mention in the psychologist's report of alcohol or pornography use in 2001.¹⁹

¹¹Government Exhibit 7 (Pre-sentencing report, dated August 19, 2005) at 2.

¹²Tr. 17-19, 42-46; Government Exhibit 7 (Sentencing Report, dated August 19, 2005).

¹³Tr. 45; Government Exhibit 9 (Sex Offender Registry, dated September 13, 2005).

¹⁴Tr. 60; Applicant Exhibit B (Medication Statement, dated May 9, 2007).

¹⁵Appellant Exhibit A (Attorney's letter, dated May 2, 2007).

¹⁶Tr. 21-22; Applicant Exhibit D (Certificate of Baptism, dated April 23, 1995).

¹⁷Tr. 32-39.

¹⁸Government Exhibit 6 (In-depth psychological evaluation, dated October 7, 2005).

¹⁹Tr. 39-40, 70.

Applicant also discussed the incidents with a therapist. There is no information presented concerning any comments made to the therapist by Applicant. There is a statement in a document developed by a government agency that initially revoked Applicant's access to SCI that "he (Applicant) told his therapist that he had not participated in drinking alcohol or viewing pornography since 1995," even though Applicant drank beer after his father-in-law's death in 2001.²⁰

Applicant was interviewed by security investigators concerning the child molestation and subsequent actions on January 12 and 13, 2006. During the interview on January 12, 2006, Applicant stated he was "really into pornography" in the 1990s and looked at areas of various interest including preteen girls and older women. He did mention that he viewed adult pornography in 2001 and masturbated while doing so. There is no indication that he mentioned viewing pre-teen pornography in 2001. Applicant did state that he ceased consuming alcoholic beverages in 1995 except for three beers in December 2001 and a champagne toast in approximately 2002. In this same interview, Applicant denied having a sexual encounter with the third girl. He did state he pled guilty to the offense involving the third girl on the advice of his attorney. The questions asked by the agent and Applicant's responses are clearly stated in the report of investigation.²¹

Applicant was interviewed again by security agents on January 13, 2006. In this interview, Applicant admitted viewing pre-teen child pornography in 2001. He stated he did not mention this to the investigator the day before because he was embarrassed about his action of returning to viewing child pornography. He admitted to sexual contact with the two young girls on a number of occasions. He again denied any sexual contact with the third young girls. He stated he provided the correct answers to all questions answered.²²

Applicant informed his supervisor of the criminal offenses. His co-workers do not know of the offenses of child endangerment nor do they know of his viewing pornography, including pre-teen pornography as late as 2004. He also has not informed his children that he viewed pornography as late as 2004.²³

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."²⁴ Eligibility for a security clearance is

²⁰Government Exhibit 5 (Memorandum Decision, dated July 20, 2006) at 2.

²¹Tr. 47-52; Government Exhibit 11 (Summary of interview, dated January 12, 2006).

²²Tr. 32-39; Government Exhibit 10 (Report, dated January 13, 2006).

²³Tr. 63-68.

²⁴*Department of the Navy v. Egan*, 484 U.S. 518 (1988).

predicated upon the applicant meeting the security guidelines contained in the Directive.²⁵ The Directive and the new guidelines sets out the adjudicative guidelines for making decisions on security clearances, listing the disqualifying conditions and mitigating conditions for each guideline. Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6.

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. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person.²⁶ An administrative judge should consider: (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 applicant'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 of recurrence.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 necessarily a determination as to the loyalty of the applicant.²⁸ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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.²⁹ Thereafter, Applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts.³⁰ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."³¹ The government is under no duty to present evidence to disprove any Adjudicative Guideline mitigating condition, and an Administrative Judge cannot assume or infer that any particular mitigating condition is applicable merely because the government does not present evidence to disprove that particular mitigating condition.³² "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the

²⁵Directive ¶ E2.2.1.

²⁶*Id.*

²⁷AG 2(a).

²⁸*See* Exec. Or. 10865 § 7.

²⁹Directive ¶ E3.1.14.

³⁰ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15.

³¹ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

³²ISCR Case No. 99-0597 (App. Bd. Dec 13, 2000).

criteria listed therein and an applicant's security suitability."³³ "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security."³⁴

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

CONCLUSIONS

I carefully considered all of the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Sexual behavior that involves a criminal offense causes a security concern because it indicates a personality or emotional disorder, reflects lack of judgment or discretion, may subject the individual to undue influence or coercion, exploitation, or duress, and can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information.³⁵

Applicant sexually molested three minor children and was convicted of three felony charges of child endangerment. This establishes Sexual Behavior Disqualifying Conditions (SB DC) ¶ 13(a) Sexual behavior of a criminal nature, whether or not the individual has been prosecuted, SB DC ¶ 13(b) A pattern of compulsive, self-destructive, or high risk behavior that the person is unable to stop or that may be symptomatic of a personality disorder, SB DC ¶ 13(c) Sexual behavior that causes an individual to be vulnerable to coercion exploitation or duress, and SB DC ¶ 13(d) Sexual behavior of a public nature and/or that reflects lack of discretion or judgment. Applicant was convicted of three criminal offenses. Child molestation is not normal activity and may be a symptom of a personality disorder. Child molestation is so against the societal norm that it leaves the person subject to coercion, exploitation, or duress. It is such an abhorrent and abnormal action that it reflects lack of discretion or judgment.

I considered Sexual Behavior Mitigating Conditions (SB MC) ¶ 14(a) The behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature, SB MC ¶ 14(b) The sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment, SB MC ¶ 14(c) The behavior no longer serves as a basis for coercion exploitation, or duress, and SB MC ¶ 14(d) The sexual behavior is strictly private, consensual, and discreet. I determine that none apply. Applicant was 39 to 40 years old, an adult and father, when he molested the young girls, so his actions were not that of an adolescent. While the molestation took place over 13 years ago, Applicant used pornography as late as three years ago which

³³ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993))

³⁴*Egan*, 484 U.S. at 531; see Directive ¶ E2.2.2.

³⁵AG ¶ 12.

shows he has not resolved his issues and that his actions are likely to recur. While Applicant's supervisor may know of his actions and he is a registered sex offender which is public knowledge, not all of his co-workers nor his daughters know of all of his actions so he is still subject to coercion, exploitation, or duress. The nature of molestation of young girls is illegal and socially unacceptable conduct and discretion is not mitigating under any circumstances. Applicant has not mitigated the security concerns for his sexual behavior.

Personal conduct is always a security concern because the conduct involving questionable judgment, lack of candor, dishonesty, or an unwillingness to comply with rules and regulations can raise question about an individual's reliability trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security process or any other failure to cooperate with the security clearance process.³⁶

The SOR allegations under Personal Conduct are Applicant provided false information or omitted certain information when interviewed by security officials and medical personnel. This raises Personal Conduct Disqualifying Condition ¶ 16(b) Deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official competent medical authority or other official government representative. The security clearance system depends on an individual providing correct and accurate information. If a person conceals or provides false information, the security clearance process cannot function properly to ensure granting access to classified information is in the best interest of the United States Government. The crux of the security concern is the deliberateness of the action in providing false information. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully. A deliberate omission or providing false statement to security investigators is a criminal offense under federal law.³⁷

The specific SOR allegations include Applicant's failure to provide information in the January 12, 2006, interview that in addition to adult pornography he viewed pre-teen pornography, that he provided inaccurate information concerning consumption of alcohol (three beers) after 1995, that he denied in the two interviews he molested the third girl; that he did not accurately state the number of times he molested the girls; that he did not inform his psychologist or therapist that he viewed pornography on the internet and drank alcohol in 2001; and that he stated he was not under the influence of alcohol when he molested the girls. The information or evidence developed by the

government to establish falsification or omission by Applicant are "sound bites" from reports of investigation, medical reports, or similar documents.

The report of the January 12, 2006, interview shows Applicant responded that he viewed pornography in 2001. The government alleged he should have stated some of the pornography was pre-teen pornography. However, Applicant correctly answered the questions asked. He was not asked about preteen pornography and correctly answered the question asked.

He consistently has stated he did not molest the third girl. While he plead guilty to the offense as a legal tactic, this does not establish he deliberately provided false information concerning the third

³⁶AG ¶ 15.

³⁷10 U.S.C. § 1001.

girl when he said he did not molest her. His response concerning the third girl has always been consistent.

The government alleged that Applicant did not state in the January 12, 2006, interview that he drank alcohol in 2001. In the report it clearly states he did tell the agent about his consumption of three beers in 2001.

The government alleges that Applicant did not accurately state the number of times he molested the girls. Applicant stated the number of times he believed he molested the two girls and also said he was unsure of the actual number. While Applicant stated he drank alcohol before molesting the girls, he stated in the pre-sentencing interview that he was not under the influence of alcohol when he molested the girls. The government presented no information as to the questions asked by the interviewing probation officer, nor Applicant's understanding of the potential difference between intoxication and influence. The government attempted to boot strap being under the influence of alcohol by the number of drinks consumed. This does not indicate a deliberate intention to provide false information with the intent to deceive.

The government alleges Applicant provided incorrect information to the psychologist and therapist. The information concerning the psychologist is based on an alleged quote from Applicant in the psychologist's report. There is no indication of the questions the psychologist or therapist asked Applicant. The sound bites in the reports are pure hearsay that does not establish any facts. Similarly, the information concerning what was told the therapist is nothing more than the conclusion reached by another government agency and does not clearly establish Applicant deliberately provided false or misleading information.

In sum, the government has failed to presenting relevant, material, and competent information to establish falsification by Applicant when providing information to security investigators or medical personnel. The evidence relied on by the government is in most cases pure hearsay information from multiple sources and thus not reliable to establish falsification or omission..

The government also alleges as security concerns that a government agency revoked Applicant's security clearance, and that the two girls molested and their families filed a civil action against Applicant because of his actions. While the facts as alleged are true and not denied by Applicant, the action of the government agency and the girls family are not issues that raise security concerns for Applicant. The allegations under Guideline E, Personal Conduct, are resolved for Applicant.

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with law, rules, and regulations.³⁸

Applicant pled guilty to and was sentenced in 2004 for three felony offenses of child endangerment. He is still serving probation as part of his sentence for these offenses. Applicant also admitted he viewed child pornography on the internet in 1994-1995, and 2001. These factors raise Criminal Conduct Disqualifying Conditions (CC DC) ¶ 31(a) a single serious crime or multiple lesser

³⁸AG ¶ 30.

offenses, and CC DC ¶ 31(d) Individual is currently on parole or probation. The government has also alleged criminal conduct based upon violations of criminal conduct for deliberately providing false information or omitting information to security investigators or medical personnel. Since the government has failed to establish deliberate falsification, the criminal conduct of providing false information is not established.

I considered the Criminal Conduct Mitigating Conditions (CC MC) for the criminal convictions, especially CC MC 32(a) So much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgement, and CC MC 32(d) There is evidence of successful rehabilitation, including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or construction community involvement. While the child endangerment happened in 1994, Applicant did not tell anyone of the offenses. His action only came to light when the girls matured and filed a criminal complaint in 2004. The criminal action is current and Applicant is still on probation. He viewed child pornography as late as 2001. There is some evidence of rehabilitation in that after Applicant molested the girls, he turned to his religion to help him, has completed college, and has a good employment record. However, he is still registered as a sex offender and on probation for his criminal conduct. He also used pre-teen pornography as late as 2001. Applicant has not mitigated security concerns for his criminal conduct of child endangerment and viewing child pornography.

The determination of Applicant's security worthiness requires a very careful and full analysis of his conduct under the "whole person" concept. The adjudication of security worthiness is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. I considered that he turned to religion to assist him in 1995 and is a valued member of his church community. I considered he is a good worker who has held a security clearance for over 15 years. His pastor and supervisor have confidence in him. I considered Applicant's felony convictions for child endangerment by molesting the young girls in 1994, and viewing child pornography in 1994 and 2001. The allegations in the SOR, taken together with a consideration of the "whole person," indicate a individual who is not trustworthy or reliable and does not exercise good judgment. Applicant has not mitigated the sexual behavior or criminal conduct security concerns. His past history of exercising poor judgment by molesting children and viewing child pornography establishes a concern that he could be blackmailed and may engage in conduct that does not safeguard classified information. Applicant's conduct indicates he is a security risk. I conclude he 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 D:

AGAINST APPLICANT

Subparagraphs 1.a.:

Against Applicant

Subparagraphs 1.b:

Against Applicant

Subparagraphs 1.c:

Against Applicant

Subparagraphs 1.d:

Against Applicant

Subparagraphs 1.e:
Subparagraphs 1.f:

Against Applicant
Against Applicant

Paragraph 2, Guideline E:

FOR APPLICANT

Subparagraph 2.a:
Subparagraph 2.b:
Subparagraph 2.c:
Subparagraph 2.d:
Subparagraph 2.e:
Subparagraph 2.f:
Subparagraph 2.g:
Subparagraph 2.h:
Subparagraph 2.i:
Subparagraph 2.j:

For Applicant
For Applicant
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For Applicant

Paragraph 3, Guideline J:

AGAINST APPLICANT

Subparagraph 3.a:
Subparagraph 3.b:
Subparagraph 3.c:
Subparagraph 3.d:

Against Applicant
For Applicant
Against Applicant
Against Applicant

DECISION

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

Thomas M. Crean
Administrative Judge